No. 95-789

In The

Supreme Court of the United States

October Term, 1995

STATE OF CALIFORNIA, DIVISION OF LABOR STANDARDS ENFORCEMENT, DIVISION OF APPRENTICESHIP STANDARDS, DEPARTMENT OF INDUSTRIAL RELATIONS; COUNTY OF SONOMA,

Petitioners,

v.

DILLINGHAM CONSTRUCTION, N.A., INC.; MANUEL J. ARCEO, dba SOUND SYSTEMS MEDIA,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN M. REA, Chief Counsel,
(Counsel of Record)
VANESSA L. HOLTON,
Asst. Chief Counsel,
FRED D. LONSDALE, Sr. Counsel,
JAMES D. FISHER, Counsel,
SARAH COHEN, Counsel,

State of California
Department of Industrial Relations
Office of the Director
Legal Unit
45 Fremont Street, Suite 450
San Francisco, CA 94105
(Mailing Address:
P.O. Box 420603,
San Francisco, CA 94142)
(415) 972-8900

Counsel for State Petitioners Department of Industrial Relations Division of Apprenticeship Standards

H. THOMAS CADELL, JR.,
Chief Counsel,
RAMON YUEN-GARCIA,
Counsel,

State of California
Division of Labor Standards Enforcement
45 Fremont Street,
Suite 3220
San Francisco, CA 94105
(Mailing Address:
P.O. Box 420603,
San Francisco, CA 94142)
(415) 975-2060

Counsel for State Petitioners Division of Labor Standards Enforcement and County of Sonoma

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether Congress intended, in enacting the Employee Retirement Income Security Act, to preempt states' traditional regulation of wages, apprenticeship and state-funded public works construction when expressed in a state prevailing wage law that restricts contractors' payment of lower apprentice specific wages to apprentices duly registered in programs approved as meeting federal standards.

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Petitioners State of California, encompassing its Department of Industrial Relations, Division of Labor Standards Enforcement and Division of Apprenticeship Standards and the County of Sonoma respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above action on June 7, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 57 F.3d 712 (9th Cir. 1995) and is reprinted in the appendix to this certiorari petition ("App.") at App. 1-22. The Order of the Court of Appeals denying California's Petition for Rehearing and Suggestion for Rehearing En Banc is reprinted at App. 53-54. The opinion of the United States District Court for the Northern District of California granting California's Motion for Summary Judgment is reported at 778 F. Supp. 1522 (N.D. Cal. 1995) and is reprinted at App. 23-52.

JURISDICTION

The Ninth Circuit issued its decision and judgment herein on June 7, 1995. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on July 19, 1995. An Application for Extension of Time to File Petition for Writ of Certiorari was filed September 28, 1995 and Justice Sandra Day O'Connor extended the time to file to and including November 16, 1995. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutes are reproduced in the appendix at App. 55-63. The relevant federal statutory provisions are §§ 514(a) and (d), 29 U.S.C. §§ 1144(a) and 1144(d) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., and the National Apprenticeship ("Fitzgerald") Act 29 U.S.C. § 50. The relevant California statutory provision is California Labor Code § 1777.5.

STATEMENT OF THE CASE

California has a prevailing wage law which sets the minimum wages on a trade by trade basis that must be paid to workers on public works projects in the state. This law is modeled after and was passed in the same year as the Davis-Bacon Act, 29 U.S.C. § 276a, which sets the minimum wages that must be paid on federal public works projects. *O.G. Sansone Co. v. Dept. of Transportation*, 55 Cal. App. 3d 434, 448, 127 Cal. Rptr. 799 (1976). Like the Davis-Bacon Act, the California law allows a lower minimum wage for registered apprentices in apprenticeship programs approved as meeting the standards of the federal Fitzgerald Act. Under California law, as under the Davis-Bacon Act, the specific prevailing wage for apprentices is set at less than that for fully trained workers in the trade and varies with the apprentices' level of progress through the multi-year apprenticeship program. Cal. Lab. Code § 1777.5.

The County of Sonoma requested bids for the construction of its County Male Adult Detention Facility, a

public works project for which state, but not federal, prevailing wages were required under the California Labor Code. In early 1987 Dillingham was awarded the construction project and became the general contractor for the detention facility. Dillingham eventually subcontracted the audio security wiring work to Sound Systems Media.

After it began work on the detention facility in January, 1988, Sound Systems' employees changed their collective bargaining representative and Sound Systems entered a new employer group. Sound Systems entered into a collective bargaining agreement with the new union in which it agreed to use apprentices to be provided by the nascent Joint Apprenticeship and Training Committee (hereinafter "the Committee") established by that union and employer group. That Committee, however, had no working apprenticeship training program.

The Committee sought approval of its proposed standards to set up a new program from the California Apprenticeship Council, the agency recognized by the federal Bureau of Apprenticeship and Training as the body with authority to approve apprenticeship programs in California for federal purposes, including the Davis-Bacon Act. 29 C.F.R. § 29.12. The program's approval was pending when Sound Systems began working on this project for the County of Sonoma.

Notwithstanding the fact the Committee's standards had not been approved, beginning in June, 1988, Sound Systems began paying certain employees, whom it would later call "apprentices," what it designated an apprentice wage rate. This was contrary to the California law which

restricted the apprentice wage rate on public works to registered apprentices in approved training programs.

It is undisputed that Sound Systems employed no registered apprentices and in fact it had no apprentice agreements for these employees in its possession during the job. Payroll records filed with the California Division of Labor Standards Enforcement, and sworn to by Sound Systems, listed no employees designated as "apprentices." App. 5-6, 28 n.3. Moreover, Sound Systems volunteered at the trial level that these individuals designated as "apprentices" received no training.

This "apprentice" wage paid by appellant was lower than the journey level specified in the prevailing wage determination issued by the Department for this public work. As a result, the Department issued a "Notice to Withhold" directing Sonoma County to withhold monies from Dillingham based on Sound Systems' failure to pay the prevailing wage in accord with California Labor Code § 1771 because an alleged apprentice rate was paid to non apprentices. The contractors filed this action May 1, 1990 in the district court seeking declaratory relief and the recovery of monies withheld.

Cross motions for summary judgment were filed before the district court. The district court rejected appellants' Employee Retirement Income Security Act (ERISA) and National Labor Relations Act, 29 U.S.C. § 151 (NLRA) preemption arguments,[1] dismissed their motion for summary judgment and granted defendants' motion, App.

[1] The district court ruled that since state enforcement of minimum apprenticeship standards constitute a valid "minimum employment standard" they are not preempted by the NLRA under *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985) and *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1 (1987). The Ninth Circuit did not reach this issue.

39-40, 48. The district court held that, because California's regulation of apprenticeship programs is part of a cooperative state-federal effort for the formulation and promotion of apprenticeship programs, it is saved from preemption by the federal Fitzgerald Act, 29 U.S.C. § 50, as incorporated in ERISA's Savings Clause, 29 U.S.C. § 1144(d).

On June 7, 1995, the Ninth Circuit reversed the district court, holding that the restriction of the apprentice prevailing wage to workers who were registered apprentices was preempted by ERISA. The Ninth Circuit based its holding on the following grounds: 1) California's application of its prevailing wage law to allow payment of the lower apprentice rate only to employees in "approved" programs had the effect and possibly the aim of encouraging participation in state approved ERISA plans while discouraging participation in unapproved ERISA plans. 2) California law was not saved from preemption by the ERISA Savings Clause because, while the Fitzgerald Act does provide for state approval of apprenticeship programs, it does not depend on state law for enforcement, does not mandate apprenticeship programs and does not seek to discourage other types of training programs. In the view of the Ninth Circuit the Fitzgerald Act would not be impaired by the preemption of this California law.

On June 21, 1995 California filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc asking

the court of appeals to consider the conflict between its decision and the decision of the Eighth Circuit in *Minnesota Chapter ABC v. Minnesota*, 47 F.3d 975 (8th Cir. 1995). The petition also asked the court to consider the conflict between its decision and the California Supreme Court's decision in *Southern California ABC v. California Apprenticeship Council*, 4 Cal. 4th 422, 14 Cal. Rptr. 491 (1992), which upheld the state approval process from an ERISA preemption challenge insofar as that process did not impose standards not found in the federal Fitzgerald Act and which was based in part on the district court decision just reversed. Finally, the court was asked to consider the effect of this Court's then very recent decision *New York State Conference of Blue Cross and Blue Shield Plans, et al. v. Travelers*, ___ U.S. ___, 115 S. Ct. 1671 (1995) which had not been briefed. The court denied the Petition for Rehearing and Suggestion for Rehearing En Banc on July 19, 1995.

REASONS FOR GRANTING THE WRIT

For over 39 years before ERISA, California had adopted as a precondition for a lower apprentice wage on public works the same requirements – state approval of the apprenticeship program and state registration of apprentices – used by the federal government as the precondition for lower apprentice wages on federal public works. Like the federal government, California recognized that unless an apprenticeship program is actually providing effective training to beginning workers, there is no justification for paying those workers less than the legally required minimum prevailing wage. Reduced to its essence, the Ninth Circuit held that a state may not, under ERISA, craft its use of its state prevailing wage law so that it will be consistent with the federal goal of encouraging apprenticeship program standards which meet federal standards. *Dillingham* results in workers being paid a wage rate, which is set lower than the prevailing journey rate, as if they were also receiving training meeting federal standards, on a *state-funded* public work without any obligation that these workers receive any training. The same wage payment at the apprentice rate by the same contractor on a *federally funded* public work to workers not registered in an apprentice plan approved by the state as meeting federal standards would bring civil, and possible criminal, sanctions.

This petition seeks certiorari on the question of whether ERISA preempts California's long standing policy of restricting the prevailing apprentice wage rate on state public works to registered apprentices, just as the comparable federal Davis-Bacon prevailing wage rules do for the same apprentices in the same trades in the same labor market on federal public works. *Dillingham*'s conclusion that ERISA requires this change in long standing rules governing prevailing wages on public works is in error. First, ERISA's Savings Clause protects this state law from preemption as in furtherance of the Fitzgerald Act's articulated purpose. Second, ERISA's Preemption Clause does not reach state regulation of apprentices' wages because such wage laws concern wages paid by contractors to apprentices and do not directly "relate to" apprenticeship plans, only some of which are covered by ERISA.

I. Conflict Exists Within The Circuits On The Breadth Of The Savings Clause Of ERISA.

There is a direct conflict between the decision of the Ninth Circuit in this case and the Eighth Circuit decision in *Minnesota Chapter ABC v. Minnesota*, 47 F.3d 975 (8th Cir. 1995). That conflict concerns an important question of national significance as to whether the Savings Clause of ERISA, 29 U.S.C. § 1144(d), protects from preemption a prevailing wage law that provides tailored wage rates only for registered apprentices in apprenticeship programs approved as meeting the standards of the Fitzgerald Act. Unless this Court resolves this conflict, contractors, apprentices and state and local public agencies in different states with similar state statutes[2] will face

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[2] Thirty-two states have prevailing wage laws.

Twenty-eight states with prevailing wage laws restrict their sub-journey apprentice-specific wage to apprentices in programs registered with or approved by the state or BAT. The rule for four states is unclear.

Of those twenty-eight states, twenty-two states make this distinction by statute, rule or regulation. Arkansas Dep't of Labor Prevailing Wage Regulations § 3.103 (Rev. 1994); CAL. LAB. CODE § 1777.5 (West 1995); CONN. AGENCIES REGS. § 31-60-8 (1995); Delaware Prevailing Wage Regulations, § III(D)(1), (2) (Amended Sept. 15, 1995); HAW. ADMIN. RULES tit. 12, § 22-6 (Effective July 27, 1981); KY. REV. STAT. ANN. § 337.520(5) (Baldwin 1982); 803 KY. ADMIN. REG. 1:020 (Effective Oct. 2, 1974); MD. STATE FIN. & PROC. CODE ANN. § 17-201(b), 205(b), 208(e) (1988); MINN. R. 5200.1070 (1995); MO. CODE REGS. tit. 8, § 30.030; NEV. REV. STAT. § 338.080(2) (1985); N.J. ADMIN. CODE tit. 12, § 60-7.1, 7.3(c) (1995); New Mexico Rules & Regs. Under the Public Works Minimum Wage Act pt. VI, 6.2, 6.4 (Dep't Lab. Sept. 1989); N.Y. LAB. LAW § 231(7)(a) (McKinney 1986); OHIO REV. CODE ANN. § 4115.05 (Baldwin 1985); OHIO ADMIN. CODE § 4101:9-4-16 (1995); OKLA. STAT. tit. 40, § 196.1, 196.2(9), 196.6(A)

uncertainty and conflicting directives concerning the use of apprentices on public works projects.

The states of California and Minnesota have regulated apprenticeship since 1852 and 1939, respectively. Under the current Secretary of Labor regulations promulgated in 1977 and through the present, both states have been approved by the Bureau of Apprenticeship and Training of the Department of Labor ("BAT") as State Apprenticeship Council ("SAC") states.[3] State

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(1991); OR. ADMIN. R. 839-16-060 (Effective Nov. 10, 1994); 34 PA. CODE §§ 9.103(9), 83.5 (1975 and 1979); Rhode Island Rules & Regs. Relating to Prevailing Wages § 5 (1995); TENN. CODE ANN. § 12-4-401, et seq. (1975); TENN. COMP. R. & REGS. § 0800-3-2-.01 (Effective April 26, 1987); WASH. REV. CODE § 39.12.021 (1991); WIS. ADMIN. CODE & IND. 92.02 (Oct. 1990); WYO. STAT. § 27-4-403(c) (1977 and Supp. 1995). The remaining six states make this distinction by what ERISA's preemption clause would characterize as "other state action having the effect of law." See, e.g., Alaska Wage & Hour Admin. Pamphlet No. 600: Laborers' & Mechanics' Minimum Rates of Pay (Dep't Labor effective Dec. 1, 1995); Commonwealth of Massachusetts, Executive Office of Labor, Division of Apprentice Training, Minimum Wage Rates for Apprentices Employed on Public Works Projects (Rev. Nov. 9, 1995); Michigan Wage & Hour Division Policy Concerning Disputes Regarding Classifications: Act 166, C. 4.08 (Rev. July 1994); Montana Dep't of Labor & Industry Prevailing Wage Requirements, § A (effective July 1, 1994).

[3] The following twenty-seven states are SAC states:

Arizona, California, Connecticut, Delaware, Florida, Hawaii, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington and Wisconsin. The District of Columbia, Puerto Rico and the Virgin Islands are also SACs. U.S. Dep't of Lab., Employ. & Training Admin.: Bureau of Apprenticeship & Training, Directory (Jan. 1995).

Apprenticeship Council states are, under BAT regulations, authorized to approve apprenticeship programs for "federal purposes," to register apprentices, and to work to encourage inclusion of federal minimum standards in programs under the Fitzgerald Act, 29 U.S.C. § 50, and its regulations, 29 C.F.R. § 29.1 et seq. "Federal purposes" include determining whether a worker may be paid at an apprentice rate on federal public works. 29 C.F.R. § 5.5(a)(4). Those regulations restrict approval of training programs to those that are extensive, sophisticated and formal enough to be "apprenticeship."

The prevailing wage laws of California and Minnesota provide that all contractors on public works pay their workers the prescribed minimum wage deemed prevailing at the journey (fully trained) level in the location and for the trade or craft in which the work is performed. These laws parallel the federal Davis-Bacon law, which similarly sets the craft specific minimum wages paid on federal public works projects. One of the purposes of such prevailing wage laws is to assure that on public works projects that are awarded to the lowest bidder the contractors will not compete by reducing the wages and quality of labor on the project. *Universities Research Ass'n, Inc. v. Contu*, 450 U.S. 754 (1981); *Lusardi Const. Co. v. Aubry*, 1 Cal. 4th 976, 4 Cal. Rptr. 2d 837 (1992).

The prevailing wage laws of both California and Minnesota provide as well that workers who are registered as apprentices and are receiving training in apprenticeship programs registered with the respective state in accord with federal law may be paid a specially tailored apprentice wage. This apprentice specific rate parallels

the exception to the federal Davis-Bacon Act's requirement of journey level wages likewise limited to apprentices registered in state[4] approved apprenticeship programs. The apprentice specific rate lowers the prevailing wage to a percentage of the journey level rate which is appropriate to the apprentice's training level. The apprentice rate is denied for workers receiving training, even informal apprenticeship, when the training program will not commit to the state to deliver the training at the level set by the federal standards, or to the apprentice by registering him or her as such in a program. Both commitments were lacking in *Dillingham*.

In *Minnesota ABC*, the Eighth Circuit held that the apprentice specific rate in the Minnesota prevailing wage law, allowing contractors to pay apprentices in approved programs at less than the prevailing wage, was "saved" from preemption under ERISA, 29 U.S.C § 1144(d), because preemption of that law would impair the Fitzgerald Act. The Fitzgerald Act provides that:

> [t]he Secretary of Labor is authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the

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[4] In California, and the other SAC states listed in footnote 3. Where states do not participate under the Fitzgerald Act, the federal BAT does the approvals, under the same substantive standards. 29 C.F.R. § 29.12, App. 84.

> formulation and promotion of standards of apprenticeship. . . .

Section 514(d) of ERISA, 29 U.S.C. § 1144(d) provides that "[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair or supersede any of the laws of the United States . . . or any rule or regulation issued under such law."

The Eighth Circuit reasoned that preemption of Minnesota's regulation, MINN. R. 5200.1070 (1993 and Supp. I 1994) would "impair" the cooperative state jurisdiction over apprenticeship programs envisioned by the Act. One purpose of the Act is to promote and encourage apprenticeship, and labor standards in apprenticeship, in cooperation with the states. Consistent with this purpose, the federal Bureau of Apprenticeship and Training has promulgated federal apprenticeship regulations under the Act to provide national standards for apprentice agreements and program approval. As the Eighth Circuit recognized in *Minnesota ABC*, the purpose of the Act and regulations would be impaired if a state were not permitted to set an appropriate wage to be paid by contractors employing apprentices on state funded public works.

Such an apprentice specific wage rate may in fact be essential for contractors to be able to use apprentices economically on public works because apprentices lack the training to be as productive as journey level workers whose wage they would otherwise receive. The failure to recognize the costs to contractors who voluntarily assume training responsibilities at the higher, and more costly, level of apprenticeship meeting the federal standards

will, in the public construction sector, where lowest bidder rules universally apply, result in contractors avoiding the commitment to multi-year apprenticeship meeting the federal standard, fearing that any added costs will cost them work because they will be at a disadvantage in bidding on public works.

The Ninth Circuit in *Dillingham*, unlike the Eighth Circuit, took an extraordinarily narrow view of both the Fitzgerald Act and the Savings Clause of ERISA, holding that the preemption of California Labor Code § 1777.5's restriction of an apprentice specific wage to registered apprentices on state-sponsored public works, as applied, would not impair the operation of the Fitzgerald Act. The Ninth Circuit reasoned that because the Act, unlike Title VII, does not preserve non-conflicting state laws and "does not contemplate enforcement mechanisms," preemption of California Labor Code § 1777.5 does not impair this federal law. App. at 17. In so holding, the Ninth Circuit adopted and quoted from the Tenth Circuit opinion in *National Elevator Industry, Inc. v. Calhoon*, 957 F.2d 1555 (10th Cir. 1992), which stated that "[The Fitzgerald Act] merely seeks to facilitate development of apprenticeship programs – it does not mandate apprenticeship programs or seek to discourage other training programs." *Id.* at 1562.

The Ninth Circuit erred by construing the Savings Clause of ERISA too narrowly. The Ninth Circuit said, in essence, that because the Fitzgerald Act does not mandate contractors to participate in apprenticeship, and does not order states to foster apprenticeship it is not the kind of "law of the United States . . . or any rule or regulation" to be saved. This holding is premised on a

top down view of federalism which presumes that cooperative partnerships between the states and the federal government are not worth saving. The Ninth Circuit restricts the state laws which can be saved to those which either are themselves coerced by the federal government, or which offer to deputize the state in a joint venture to coerce the private sector. Such a restrictive interpretation of the Savings Clause puts at risk the general run of laws in broad areas of benefits and health touched by ERISA, where cooperative federalism is increasingly the federal goal and where congressional reforms and block grants should allow the private sector and the state to voluntarily enter into partnerships.[5]

There is nothing in the ERISA Savings Clause that suggests that only certain kinds of federal statutory schemes are to be saved. Section 1144(d) says that ERISA "shall not be construed to alter, amend, modify, invalidate, impair, or supersede *any* laws of the United States . . . " (emphasis added). Although the leading case protecting a state law under this section dealt with a law that was coercive, *Shaw v. Delta Air Lines*, 463 U.S. 63, 100-106 (1983), in neither that opinion nor in the text of

[5] Examples of laws implicated include the Job Training Partnership Act, 29 U.S.C. §§ 1501 et seq., the Carl Perkins Vocational and Applied Technology Education Act, 20 U.S.C. §§ 2301 et seq., and School to Work Opportunities Program, 20 U.S.C. §§ 6101 et seq. which assist the states, working in partnership with private industry and others, to create "state plans" to provide financial and technical support to encourage the vocational education and training of students and workers. State participation is voluntary, like the Fitzgerald Act, and the states are free to create their own criteria to determine which programs to support. 20 U.S.C. § 2323, 20 U.S.C. § 6143(d).

ERISA is there a proviso restricting this clause to coercive laws. The federal government cannot effectively encourage states to promote apprenticeship standards, meeting federal basic standards, if ERISA is read as preempting states when they voluntarily adopt those standards as their definition of "apprentice" on state public works.

Aside from misreading ERISA's federal law Savings Clause, the Ninth Circuit narrowly and selectively read the congressional intent set out expressly in the text of the Fitzgerald Act. While the Ninth Circuit recognized that Congress noted and approved of a cooperative state-federal venture in the Fitzgerald Act, it missed an expression of intent equally worth saving: The promotion and the furtherance of labor standards necessary to safeguard the welfare of apprentices and the extension of "the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship." The Ninth Circuit's narrow reading of the congressional mandate does not square with the fact that "contracts of apprenticeship" are, by the Secretary of Labor's own definition,[6] multi-year educational endeavors, encompassing the apprentices' work on private, state-funded and federally funded work in a trade or craft, and not a transient arrangement entered into for one federal public works job, and then discarded. It is paradoxical that the only role *Dillingham* saves for the state under the Act is to extend labor standards on federal projects by reviewing and approving programs for BAT, and registering those programs' apprentices for BAT, so that federal public

[6] 29 C.F.R. §§ 29.2(e), 29.5, App. 65, 72-75.

works can preserve apprentices' labor standards on federal jobs, in precisely the ways that the state may not on its own. Indeed, many states may no longer choose to volunteer for such a job, and instead may wash their hands of any so limited a role in promoting apprenticeship.

The Ninth Circuit's holding sets in motion a labor market distortion ruinous to the congressional goals of the Fitzgerald Act. The Ninth Circuit's rule creates an economic disincentive for contractors to enter into apprenticeship agreements that meet the federal standards for training. If any worker can be paid the lower apprentice wage on public works just because the worker is ensconced in a generic unapproved program which is less costly because it has no objective training standards, is thrown together for a single contract, lacks outside schooling or safety training, and allows an unlimited number of apprentices to work regardless of whether journey level workers are present to provide on-the-job training – but is covered by ERISA[7] – then contractors have an economic incentive to move to such cheaper

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[7] Although, in order to be covered by ERISA, a plan need not even be a formal written plan, *Donovan v. Diilingham*, 688 F.2d 1367 (11th Cir. 1988), a one-page trust form would allow a contractor to draft a minimally adequate plan to bring the temporary "apprenticeship" arrangement under ERISA. The plan need not comply with all of ERISA's requirements. *Id.* Benefit levels for welfare benefits can be changed at any time. *McGann v. H&H Music Co.*, 946 F.2d 401 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 482 (1992). Welfare benefit plans permit employers to be their own plan trustees, and no minimum funding is required by ERISA, unlike pension plans.

programs and away from federally approved apprenticeship. By restricting the apprentice wage to apprentices in programs approved as meeting the federal standards for apprenticeship, the federal goal of minimum apprenticeship standards is protected.

States will also pull back from apprenticeship because they will be concerned that the lack of any objective standards for who can be paid an apprentice wage rate will undercut the prevailing wage law completely. *Cf. Building and Const. Trades v. Donovan*, 712 F.2d 611, 625 (D.C. Cir. 1983) (prevailing wage laws can be subverted by arbitrary classifications). Restricting the reduced apprenticeship wage to registered apprentices in approved plans is needed to protect the regulation of the journey-level prevailing wage for the same reasons that the Davis-Bacon regulations restrict the availability of apprentice wages on federal public works to registered apprentices in plans approved by the state. The real (non ERISA related) problem is that if the state allows anyone to be called an "apprentice" at the contractor's option, then there is no longer a prevailing wage which can be enforced at the journey level. Ethical contractors will lose bids to those willing to style all workers "apprentices" and pay the lowest wage, getting around the prevailing wage law. The most logical way out of the dilemma is to restrict the apprentice-specific wage to those to whom the nation-wide definition, in the Secretary of Labor's regulations, applies – apprentices registered in programs which meet the federal standards, and have the approval to show it. Contractors must be able to bid on public works without concern that a competitor will have an unfair advantage in the bid process by using phony apprentices.

The Ninth Circuit also creates another disincentive for states to promote apprenticeship. Although apprentices registered in state approved programs are, by definition, less skilled than the journey level workers, they are at least overseen by journey level workers on the state job and participate in ongoing classroom instruction, 29 C.F.R. § 29.5(b)(9). This is not true for "apprentices" in ad hoc informal programs. If the apprentice wage is not restricted to registered apprentices in programs with some minimum guarantee of standards, the states have lost an important guarantee of adequate quality of craft[8] work on public works projects. For the state to encourage apprenticeship and allow less skilled workers on public works projects, the state must be convinced that the apprentices are workers whom the contractor has a self-interest in teaching to work up to high standards because the contractor must live with the consequences of his teaching beyond this one job which happens to be public works.

A rule like the Ninth Circuit's which commands states to allow apprentice wages to those not registered in programs that are approved as meeting federal standards, while state approval continues to be required on federal Davis-Bacon construction in the same state, runs against Congress's intent in ERISA of protecting employers from "conflicting and inconsistent state and local regulation"

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[8] Construction work that is unskilled is done by laborers. Workers who do the skilled craft work must be paid the journey level rate for that craft, except for apprentices. It is the opportunity to have the craft work done by the unskilled at the modest apprentice rate which will threaten the quality of the work done.

of such plans, to the degree that the apprenticeship programs are covered by ERISA. *Travelers* at 1677-1678. Since federal Davis-Bacon rules restrict the wage break to registered apprentices in approved programs, a different rule for state projects would create the absurd situation that ERISA, in the name of simplicity and uniformity, creates one set of rules for a contractor working on a federal courthouse or jail and another set of rules when that same contractor goes across the street to wire the sound security system in the county jail, as here.

The Ninth Circuit has taken an unnecessarily narrow view of the ERISA Savings Clause which, as discussed above, leads to results which are counter to the intent of Congress in passing ERISA and the Fitzgerald Act. The Eighth Circuit's *Minnesota ABC* contrary view creates no such anomalies. This Court should grant certiorari in order to resolve this direct conflict between the Circuits and, as will be discussed below, effectuate the intent of Congress which this Court has recently emphasized is the touchstone for understanding the limits of ERISA pre-emption.

II. The Ninth Circuit's Conclusion That Congress Invalidated California's Longstanding System Of Setting Prevailing Wages For Apprentices On Public Projects When It Enacted ERISA Is Based On The "Unhelpful" Approach To ERISA Preemption Specifically Disapproved In *New York State Conference of Blue Cross and Blue Shield et al. v. Travelers*, 115 S. Ct. 1671 (1995).

The Ninth Circuit in this case erred not only in its application of ERISA's Savings Clause but also in

disregarding entirely an opinion, *New York State Conference of Blue Cross and Blue Shield et al. v. Travelers*, 115 S. Ct. 1671 (1995), decided two months before Dillingham in which this Court "recognize[d] that our prior attempt to construe the phrase 'relate to' does not give . . . much help," 115 S. Ct. at 1677, and announced a new orientation in determining the reach of ERISA preemption.[9]

Specifically, the Ninth Circuit's decision concluded that § 514(a) of ERISA, declaring preempted "all state laws insofar as they . . . relate to any employee benefit plan," is applicable here even though the statute preempted is a law of general application which applies without regard to whether the apprenticeship program in question is an ERISA-covered plan or not; even though the statute applies to contractors, not plans; even though assuring effective apprenticeship training of young people has long been understood to be a traditional concern of state governments; and even though the statute, which governs only contracting by state entities, does not affect any employer who does not choose to do business with the state or its subdivisions. App. 15. In ruling that the law "relates to" ERISA plans the Ninth Circuit made no attempt to inquire into whether its ruling serves the overall purposes of ERISA and of ERISA preemption, nor did the court below inquire into whether there was any indication that Congress in 1974 had intended to displace

[9] Petitioners specifically brought *Travelers* to the Ninth Circuit's attention in their Petition for Rehearing and Suggestion for Rehearing In Banc.

states from their traditional role of assuring both adequate training and fair labor standards for apprentices working on state-funded projects.

Just last term, however, in *Travelers* this Court rejected such "uncritical literalism" in applying § 514(a) of ERISA. 115 S. Ct. at 1677. First, *Travelers* noted that "[i]f 'relate to' were taken to the furthest reaches of indeterminacy, then for all practical purposes pre-emption would never run its course." *Id.* At the same time, *Travelers* recognized that it is apparent both from statutory terms of limitation and "the presumption against pre-emption," *id.*, that ERISA does not displace states' authority to legislate *whenever* there is some impact on an employee benefit plan. Because of "the unhelpful text [of § 514(a)] and the frustrating difficulty of defining its key term," *id.*, *Travelers* superseded this Court's "prior attempt to construe the phrase 'relate to' " with a new mode of analysis based on "looking . . . to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Id.*

Because the Ninth Circuit's text-centered approach to ERISA preemption is in tension with *Travelers*, this case presents the opportunity to spell out the implications of the objective intent-oriented approach to ERISA preemption beyond the narrow health-cost containment context there presented.

Like *Travelers*, this is not a case in which the ERISA preemption question can be answered simply on the basis that the state law in question expressly makes a "reference to" ERISA plans. *See Travelers*, 115 S. Ct. at 1677. The only requirement for taking advantage of the sub-journey

level apprentice wage on California public works projects is that the apprentice in question be registered with the state through a recognized apprenticeship program meeting federally-specified criteria. Apprenticeship programs, both as commonly understood, and as described in 29 C.F.R. § 29.3-29.6, do not pay prevailing wages to any workers employed on public works. Contractors do. Thus, laws that set prevailing wages for public works projects do not deal with the administrative or financial workings of benefit plans at all. It is true, of course, that providing for a lower apprenticeship wage on public works projects only for registered apprentices may have the effect of encouraging employers to employ registered apprentices so that they will be able to save money. But *Travelers* makes clear, at the least, that as the form of state involvement becomes one not of mandating a preference for one employee benefit plan over another, but of creating economic incentives that may affect employer preferences, the presumption against preemption becomes stronger.

Although the Ninth Circuit apparently assumed that *all* the state-certified apprenticeship programs are ERISA-covered plans, and that the reference in the state law to such programs is therefore a reference to ERISA plans, in fact no such identity exists. Rather, as the United States Secretary of Labor previously explained to this Court in another case holding a state law preempted by ERISA because of ERISA's coverage of "apprenticeship or other training programs," § 3(1)(A), 29 U.S.C. § 1002(1)(A), Department of Labor regulations make clear that "neither on-the-job training nor classroom training paid for out of an employer's general assets is an ERISA plan." *Lennes v.*

Boise Cascade Corp., No. 91-707, Brief for the United States as Amicus Curiae on the Petition for Writ of Certiorari at 9, *citing* 29 C.F.R. § 2510.3-1(b)(3)(iv); 40 Fed. Reg. 24, 643; 29 C.F.R. § 2510.3-1(b); 29 C.F.R. § 2510.3-1(k); ERISA Advisory Opinions Nos. 76-01 and 83-32A; and *Massachusetts v. Morash*, 490 U.S. 107 (1989).[10] Consequently, it is "not the case" that "any law relating to apprenticeship or training necessarily relates to covered plans only." *Id.* at 15. Rather, a state law that refers to apprenticeship plans generally "affects many programs not subject to ERISA," *id.*, and therefore cannot be deemed preempted as a law that singles out ERISA plans for special treatment. *Compare Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 829 (1988).

The question, here, as in *Travelers*, is whether the available legislative and historical materials as a whole indicate that the California apprentice prevailing wage provisions, typical of the majority of states, are within the "scope of state law that Congress understood would survive." *Travelers*, 115 S. Ct. at 1677. There are at least two reasons, which the Ninth Circuit did not look at here, and will not look at in the future under its analytical model for preemption, for finding that the law invalidated below is not a statute of the kind Congress intended to preempt.

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[10] As that Brief also noted, "[c]ongress included apprenticeship programs . . . in the definition of 'employee welfare benefit plan' because it was concerned with regulating trust funds established in providing training." *Id.* at 16. Here, the state law in question has no bearing on the financial aspects of providing apprenticeship training.

First, as *Travelers* recognized, Congress's basic objective in enacting ERISA's preemption provision was to eliminate conflicting regulation of pension and welfare benefit plans, not to supersede the historic powers of the states beyond the degree necessary to accomplish that uniformity. 115 S. Ct. at 1680 ("nothing in the language of the Act or the context of its passage indicates that Congress chose to displace general health care regulation, which historically has been a matter of local concern").

Nothing in ERISA regulates substantively either wages (prevailing or otherwise) or the operative aspects of apprenticeship programs (such as the content of the training provided, the number of years apprentices serve, the ratio of journeypersons to apprentices, the procedural rules governing discharge from apprenticeship programs, etc.). On the other hand, like health care, both wages and the supervision and support of apprenticeship programs have been "historically . . . matter[s] of local concern," in the sense that state and local involvement in these areas was, at the time ERISA was passed, widespread and detailed.

In this instance, voiding California's authority to limit the application of special apprenticeship wages to registered apprentices not only interferes with the state's wage-setting authority on public works projects with respect to apprentices, but also eliminates any meaningful ability to establish wages for *any* workers on public works projects. *See* p. 17, *supra*, (explaining that under the decision below, contractors can successfully evade the prevailing wage laws entirely by designating any workers they please as apprentices).

Like both general wage regulation and the state's own public works, the governance of the substantive aspects of apprenticeship, has always been an area in which the states have been heavily involved.[11] Education generally has always been largely the province of state law, and apprenticeship programs developed initially as simply one way among many to provide young people with the training to succeed in the adult world of work. The history of apprenticeship particularly demonstrates that the states had long regulated both the wages and the working and training conditions of apprentices. As we have seen,[12] the federal Fitzgerald Act, enacted in 1937,

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[11] It is important to note that, as *Morash* observed, interpreting ERISA to federalize an area of traditional state concern – there vacation wages, here wages and apprenticeship regulation – is to redirect disputes arising in those areas from state to federal dispute-resolution fora. California currently asserts jurisdiction over complaints by its 40,000 to 50,000 apprentices against their apprenticeship programs, Cal. Lab. Code § 3078(h), and accepts their wage complaints against employers under general wage dispute statutes. Cal. Lab. Code § 229. If all aspects of apprenticeship programs, including the wages paid to apprentices, are, as the opinion below implies, governed solely by federal law, the necessary effect is "vastly [to] expand the jurisdiction of the federal courts, providing a federal forum for any employee with a vacation grievance." *Morash*, 490 U.S. at 118-119.

[12] *See, e.g.*, TO SAFEGUARD THE WELFARE OF APPRENTICES: HEARINGS ON H.R. 6025 BEFORE A SUBCOMM. OF THE COMM. ON LABOR, 75th Cong., 1st Sess. (1937); HOUSE COMM. ON LABOR, SAFEGUARD THE WELFARE OF APPRENTICES, H.R. Rep. No. 945, 75th Cong., 1st Sess. (1937) App. 107; 81 Cong. Rec. 6631 (1937). (Discussion between Representative Fitzgerald and Reps. Hoffman and Ditter) App. 111; G. ABBOTT, The Child and the State, Vol. I (1938).

was intended to build upon this major state role in delineating apprenticeship training and labor standards.

Given this historical, statutory, and regulatory background, neither § 514(a) nor ERISA's lack of substantive attention to apprenticeship can sensibly be understood as evidencing an Congressional intention to *preclude* states from attending to and supporting effective and successful on-the-job training of young people.[13] Rather, the more appropriate conclusion is that Congress assumed that ERISA was *not* disturbing the long-standing arrangements for substantive encouragement of basic and adequate apprenticeship standards by states, which prevailed under the Fitzgerald Act.[14] This conclusion is

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[13] Rules pertaining to public contracting, like wage and apprenticeship rules, are within an area of traditional state concern as to which it is at least unlikely the Congress intended widespread preemption. *Cf. Building & Construction Trades Council v. Associated Builders & Contractors*, 113 S. Ct. 1190 (1993).

[14] Both *Electrical Joint Apprenticeship Comm. v. MacDonald*, 949 F.2d 270 (9th Cir. 1991), *cert. denied*, 505 U.S. 1204, 112 S. Ct. 2991 (1992) and *Southern California ABC v. California Apprenticeship Council*, 4 Cal. 4th 422, 14 Cal. Rptr. 491 (1992) addressed the impairment of the Fitzgerald Act's aim of promotion of apprenticeship standards in the context of state approval of apprentice program standards. In brief, both decided (*So. Cal. ABC* relying, in part, on the district court opinion here) that ERISA preemption of state authority to approve would impair the Fitzgerald Act, and therefore preemption is prevented by the Savings Clause, whereas preemption of state requirements in excess of the Secretary of Labor's regulations would not.

In this case, no party has contended that the state laws applied in certifying the program in issue here in any way went beyond the requirements that the state was required to follow for federal recognition. Consequently, the issue of ERISA preemption's effect on state authority to impose requirements exceeding those in the federal regulations is not presented here.

reinforced by the fact that during consideration of ERISA and after its passage, those who would be most likely to know of Congress's intent in passing ERISA continued to assume that the federal state partnership remained a key component of the federal regulation of apprenticeship under the congressional mandate found in the Fitzgerald Act, and did not assume that the Secretary of Labor's state partners had lost authority.[15]

Second, where states wish to have effective prevailing wage laws, they have no practical way of *avoiding* some impact on apprenticeship plans. As explained previously, *supra*, pp. 16-18, the only real choice such states have is between *discouraging* apprenticeship on public works by failing to provide a lower-than-journey person wage rate; permitting employers to pay apprentice wage to anyone they please, thereby undermining the prevailing wage system entirely; or providing *some* basis for specifying

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[15] *See* statements re substantive role of the states by the Secretary of Labor, charged with primary responsibility for enforcing both ERISA and the Fitzgerald Act in the Federal Register preceding the current final rule of 29 C.F.R. § 29, 38 Fed. Reg. 13,894 (1973) (to be codified at 29 C.F.R. pt. 29) (proposed May 25, 1973); 40 Fed. Reg. 11,340 (1975) (to be codified at 29 C.F.R. pt. 29) (proposed Mar. 10, 1975); 42 Fed. Reg. 10,138-10,139 (1977) (to be codified at 29 C.F.R. pt. 29), reprinted in App. 93-106; *Oversight Hearings on the National Apprenticeship Training Act, 1983: Hearings before the Subcomm. on Employment Opportunities of the Comm. on Education and Labor*, H.R., 98th Cong., 1st Sess. (1984); GAO Report, Apprenticeship Training Administration, Use and Equal Opportunity (1992); Lyndon B. Johnson School of Public Affairs, Coordination of State and Federal Apprenticeship Administration, Volume 2, (1980).

who may be paid at the lower, apprentice wage rate – namely, workers who are receiving actual training on a long-term basis. As noted previously, this same practical situation has resulted, on federal public works projects, in provisions regarding apprenticeship wages substantially identical to those here at issue. 29 C.F.R. § 5.5(a)(4). To the extent that the policy of simplicity and uniformity behind ERISA preemption informs the debate, that policy suggests that preemption should not result in mandating *different* rules regarding who is an apprentice, paid at apprenticeship wage rates, with state public works projects on one side and federal or joint federal state ones on the other. Nor is there any basis for supposing that in enacting ERISA Congress intended to preclude the states from reaching the practical solutions to public contracting issues permitted to the federal government.

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Dated: November 16, 1995, San Francisco, California

Respectfully submitted,

JOHN M. REA, Chief Counsel,
(Counsel of Record)
VANESSA L. HOLTON,
Asst. Chief Counsel,
FRED D. LONSDALE, Sr. Counsel,
JAMES D. FISHER, Counsel,
SARAH COHEN, Counsel,

State of California
Department of Industrial Relations
Office of the Director
Legal Unit
45 Fremont Street, Suite 450
San Francisco, CA 94105
(Mailing Address:
P.O. Box 420603,
San Francisco, CA 94142)
(415) 972-8900

Counsel for State Petitioners Department of Industrial Relations Division of Apprenticeship Standards

H. THOMAS CADELL, JR.,
Chief Counsel,
RAMON YUEN-GARCIA,
Counsel,

State of California
Division of Labor Standards Enforcement
45 Fremont Street,
Suite 3220
San Francisco, CA 94105
(Mailing Address:
P.O. Box 420603,
San Francisco, CA 94142)
(415) 975-2060

Counsel for State Petitioners Division of Labor Standards Enforcement and County of Sonoma

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DILLINGHAM CONSTRUCTION N.A., INC., a California Corporation; MANUEL J. ARCEO, dba SOUND SYSTEMS MEDIA, *Plaintiffs-Appellants,* v. COUNTY OF SONOMA; DIVISION OF LABOR STANDARDS ENFORCEMENT; DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF APPRENTICESHIP STANDARDS, et al., *Defendants-Appellees.*	No. 92-15247 D.C. No. CV-90-01272-FMS OPINION

Appeal from the United States District Court
for the Northern District of California
Fern M. Smith, District Judge, Presiding

Argued and Submitted
April 14, 1993 – San Francisco, California

Filed June 7, 1995

Before: William C. Canby, Jr., and Melvin Brunetti, Circuit Judges, and Robert E. Jones,* District Judge.

Opinion by Judge Brunetti

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* Honorable Robert E. Jones, United States District Judge for the District of Oregon, sitting by designation.

COUNSEL

Richard N. Hill, Littler, Mendelson, Fastiff, Tichy & Mathiason, San Francisco, California, for the plaintiffs-appellants.

Ramon Yuen-Garcia, Department of Labor Standards Enforcement, San Francisco, California, for the defendants-appellees.

John M. Rea, Department of Industrial Relations, San Francisco, California, for the defendants-appellees.

OPINION

BRUNETTI, Circuit Judge:

The issue presented in this case is whether ERISA preempts the application of a state prevailing wage law that requires payment of prevailing wages to employees in apprenticeship programs that have not received state approval but allows the payment of lower apprenticeship wages to employees participating in state approved programs. We hold that it does.

I. CALIFORNIA APPRENTICESHIP REGULATIONS

As described by the district court, California's administrative framework for regulating apprenticeships is complex. Rules and regulations establishing minimum standards of wages, hours and working conditions for apprentices are created by the California Apprenticeship Council ["CAC"] which is located within the Division of

Apprenticeship Standards ["DAS"]. The California Code of Regulations provides that "[a]pprenticeship programs shall be established by written standards approved by the Chief of DAS" and sets forth a detailed list of program standards that must be covered before the program is approved. Cal.Code Regs. tit. 8, § 212.

The CAC exercises approval authority over apprenticeship programs pursuant to the Fitzgerald Act, 29 U.S.C. § 50 and its implementing regulations, 29 C.F.R. §§ 29.1-29.13. The federal regulations establish criteria under which a state agency may be recognized as the appropriate agency for registering local apprenticeship programs for federal purposes. 29 C.F.R. § 29.12.

Section 1771 of the California Labor Code requires state public works contractors to pay their employees "prevailing wages."[1]

Contractors who are awarded public works projects agree to pay prevailing wages to all their construction employees at the journeyman level in specified trades. Public works contractors that employ apprentices can pay them an amount lower than the prevailing journeyman

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[1] Section 1771 provides in part:

> . . . not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed . . . shall be paid to all workers employed on public works.
>
> This section is applicable only to work performed under contract, and is not applicable to work carried out by a public agency with its own forces. . . .

Cal.Labor Code § 1771.

wage so long as those apprentices are part of an approved apprenticeship program under California Labor Code section 1777.5.[2]

Until employees on a public works project are enrolled in an apprenticeship program whose training and education standards meet state-established minimums, the prevailing wage statute requires that they be paid at higher, journeyman rates.

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[2] Section 1777.5 provides in part:

> Nothing in this chapter shall prevent the employment of properly registered apprentices upon public works.
>
> Every such apprentice shall be paid the standard wage paid to apprentices under the regulations of the craft or trade at which he or she is employed, and shall be employed only at the work of the craft or trade to which he or she is registered.
>
> Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards and written apprenticeship agreements . . . are eligible to be employed on public works. The employment and training of each apprentice shall be in accordance with the apprenticeship standards and apprentice agreements under which he or she is training.
>
> When the contractor to whom the contract is awarded by the state . . . employs workers in any apprenticeable craft or trade, the contractor and subcontractor shall apply to the joint apprenticeship committee . . . for a certificate approving the contractor or subcontractor under the apprenticeship standards. . . . However, approval . . . shall be subject to the approval of the Administrator of Apprenticeship.

Cal.Labor Code § 1777.5.

II. FACTS AND PROCEEDINGS

Dillingham Construction was awarded a state public works contract to construct a detention facility in Sonoma County. The detention facility project was a public works project within the meaning of California Labor Code § 1720. Dillingham Construction subcontracted electric work to Sound Systems Media, a sole proprietorship of Manuel Arceo. Arceo was a member of the International Brotherhood of Electric Workers ("IBEW").

When Sound Systems began work on the job, it paid its employees in accordance with the collective bargaining agreement between the IBEW Local 202 and the National Electric Contractors Association which included a scale for apprentice electronic technicians and required Sound Systems to make contributions to the Northern California Sound and Communications Joint Apprenticeship Training Committees ("JATC"), a state approved JATC. JATCs are the source of the apprentices and provide for their training. However, after the job began, the IBEW Local 202 withdrew its representation of Sound System's electronics technician employees, leaving Sound Systems without a collective bargaining agreement to establish compensation. About a month after the IBEW's withdrawal, Sound Systems joined the Northern California Electrical Sound Communications Association ("NCESCA"), a multi-employer association of electrical contractors. NCESCA signed a collective bargaining agreement with the National Electronic Systems Technicians Union ("NESTU") which provided wage scales for all employees, including apprentices and covered Sound Systems' electronic technicians. NESTU was associated with the Electronic and Communications JATC, a new

JATC which had not been approved by the State when Sound Systems began relying on it for apprentices. (State approval was later received but is not retroactive.) Sound Systems paid its employees in compliance with this collective bargaining agreement. In some instances, the rates under the collective bargaining agreement were less than the state prevailing wage rates.

After an investigation, the DLSE issued a Notice Withholding Payment from Dillingham Construction with Sonoma County due to Sound System's failure to pay some of its workers prevailing wage rates in violation of California Labor Code § 1771. Dillingham Construction is liable for the acts of its subcontractors under California Labor Code § 1775.

Dillingham does not dispute that Sound Systems paid some of its workers less than the prevailing wages for journeymen, but claims that those workers were "apprentices" and that Sound Systems was entitled to pay them less than journeyman prevailing wage rates pursuant to the NESTU collective bargaining agreement. However, it is uncontested that the "apprentices" did not come from a state approved JATC.

In this action, the plaintiffs Dillingham Construction and Sound Systems Media (collectively referred to as "Dillingham") sought a declaratory judgment that the enforcement of California's journeyman prevailing wage rate pursuant to California Labor Code sections 1773-1777.1 was preempted by the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-58 and the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461, and that by attempting to enforce it,

the State interfered with rights established under federal labor law, in violation of 42 U.S.C. § 1983.

On cross motions for summary judgment, the district court held that the California prevailing wage law is not preempted by the NLRA or ERISA and granted summary judgment in favor of the Division of Labor Standards Enforcement ("DLSE"), the County of Sonoma, and the Division of Apprentice Standards ("DAS") (collectively referred to as "the State"). We reverse.

A grant of summary judgment is reviewed de novo. *Hydrostorage Inc. v. Northern Cal. Boilermakers Local Joint Apprenticeship Comm.*, 891 F.2d 719, 726 (9th Cir.1989), *cert. denied*, 498 U.S. 822 (1990). The parties agree that there are no disputed issues of material fact. Therefore, we need only determine whether the district court correctly applied the relevant law. *Id.*

The district court had jurisdiction pursuant to 28 U.S.C. § 1331. The appeal was timely, and we have jurisdiction under 28 U.S.C. § 1291.

III. DISCUSSION

A. Estoppel

The state argues that because Dillingham voluntarily agreed to perform the contract in conformity with the requirements of the state prevailing wage law and apprenticeship standards, it is estopped from challenging the state laws on constitutional grounds. This issue was not raised before the district court and we refuse to consider it for the first time on appeal. *International Union*

of Bricklayers v. Martin Jaska, Inc., 752 F.2d 1401, 1404 (9th Cir. 1985).

B. ERISA Preemption

We first consider the issue of ERISA preemption. "ERISA is a comprehensive remedial statute designed to protect the interests of employees in pension and welfare plans, and to protect employers from conflicting and inconsistent state and local regulation of such plans." *Electrical Joint Apprenticeship Committee v. MacDonald*, 949 F.2d 270, 272 (9th Cir.1991), *cert. denied*, 112 S.Ct. 2991 (1992) (quotations and citations omitted).

We have addressed the issue of ERISA preemption in relation to state apprenticeship programs in *Hydrostorage*, 891 F.2d 719, and *MacDonald*, 949 F.2d 270.

In *Hydrostorage*, the plaintiff was awarded a public works contract to construct a water storage tank for a county water district. The California Apprenticeship Council found the plaintiff in violation of California Labor Code section 1777.5, which required a contractor on a public works project to apply for a certificate of approval from a JATC, employ apprentices at a specified ratio and contribute to an appropriate fund. An administrative order was issued barring Hydrostorage from future public works contracts. The district court held that enforcement of the order was preempted by ERISA but the court did not strike down section 1777.5 as a whole, but only its application. We affirmed.

In *MacDonald*, we held that ERISA preempted Nevada's enforcement of its prevailing wage statute. Like

California's prevailing wage law, Nevada requires payment of prevailing wages on state public works projects but allows lower apprentice wages to be paid to apprentices from programs approved by the Nevada State Apprenticeship Council. In *MacDonald*, the plaintiff was required to pay prevailing wages to apprentices employed from an apprenticeship program which had received federal but not state approval. We found this application of Nevada's prevailing wage statute to be preempted by ERISA because the Federal Bureau of Apprenticeship and Training had already authorized the apprenticeship program at issue, yet the state asserted jurisdiction over and withheld approval of the same program pursuant to its own statutes and regulation.

These cases do not address the specific issue presented here of whether ERISA preempts the application of a state prevailing wage law that requires payment of prevailing wages to employees in apprenticeship programs that have not received state approval but allows the payment of lower apprenticeship wages to employees participating in state approved programs. However, the Tenth Circuit addressed this issue in *National Elevator Industry, Inc. v. Calhoon*, 957 F.2d 1555 (10th Cir.), *cert. denied*, 113 S. Ct. 406 (1992). Relying in part on *Hydrostorage* and *MacDonald*, the Tenth Circuit concluded that ERISA does preempt this application of a state prevailing wage law.

In the case at hand, the district court followed the three part analysis we established in *Hydrostorage*. First, it found that Sound System's apprenticeship program constituted an "employee benefit plan" under ERISA. Next,

it held that the California approval scheme for apprenticeship programs "related to" the employee benefit plan and thus fell under ERISA's preemption clause. Finally, the court concluded that the application of the California approval scheme was saved from preemption by the ERISA savings clause, 29 U.S.C. § 1144(d). We address each of these findings in turn.

1. An ERISA "employee welfare benefit plan"

ERISA governs "employee benefit plans," which are statutorily defined as plans that are either an "employee welfare benefit plan," an "employee pension benefit plan," or both. 29 U.S.C. § 1002(3); *Massachusetts v. Morash*, 490 U.S. 107, 113 (1989).

29 U.S.C. § 1002(1) defines an ERISA employee welfare benefit plan as:

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries . . . *apprenticeship* or other training programs. . . .

29 U.S.C. § 1002(1) (emphasis added).

The district court concluded that the program Sound Systems purported to establish through the Electronic and Communications JATC was an "apprenticeship or other training program" within the meaning of 29 U.S.C. § 1002(1). We agree.

This conclusion is consistent with our analysis in *Hydrostorage* that an apprenticeship program established for the purpose of providing apprenticeship training falls within the plain meaning of section 1002(1)'s definition of "employee welfare benefit plan." *Hydrostorage*, 891 F.2d at 728; *see also MacDonald*, 949 F.2d at 272 (reaching the same conclusion without explanation).

2. ERISA's preemption clause

ERISA contains a very broad preemption clause which provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter II of this chapter shall supercede any and all state laws insofar as they may now or hereafter *relate to* any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. § 1144(a) (emphasis added).

ERISA's preemptive scope was intended by Congress to be as broad as its language suggests. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98 (1983) (citing H.R. Conf. Rep. No. 93-1280 p. 383 (1974)). The Supreme Court has noted that "[t]he pre-emption clause is conspicuous for its breadth. It establishes as an area of exclusive federal concern the subject of every state law that 'relate[s] to' an employee benefit plan covered by ERISA." *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990).

The phrase "relates to" has also been broadly defined by the Court.

> "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." Under this "broad common-sense meaning," a state law may "relate to" a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect. Pre-emption is also not precluded simply because a state law is not consistent with ERISA's substantive requirements.

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 139 (1990) (citations omitted).

Our additional requirement, set out in *Hydrostorage*, 891 F.2d at 729, that a state law "purport to regulate" or "attempt to reach" the terms and conditions of an employee welfare benefit plan in order for it to be pre-empted was rejected by the Court in *Ingersoll-Rand*, where it noted:

> Had Congress intended to restrict ERISA's pre-emptive effect to state laws purporting to regulate plan terms and conditions, it surely would not have done so by placing the restriction in an adjunct definition section while using the broad phrase 'relate to' in the pre-emption section itself. . . . Moreover, our precedents foreclose this argument. In *Mackey* the Court held ERISA pre-empted a Georgia garnishment statute that *excluded* from garnishment ERISA plan benefits. *Mackey [v. Lanier Collection Agency & Serv. Inc.*, 486 U.S. 825, 828-29 n.2 (1988)]. Such a law clearly did not regulate the terms or conditions of ERISA-covered plans, and yet we found pre-emption.

Ingersoll-Rand, 498 U.S. at 141-42; *see also, National Elevator*, 957 F.2d at 1557 n.1.

However, the Court has made clear that there are some limits to the scope of ERISA preemption. "Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw*, 463 U.S. at 100 n.21.

We must determine whether the state's enforcement of its prevailing wage law against Dillingham "relates to" an ERISA plan. This is the correct inquiry because Dillingham challenges the state's effort to enforce its prevailing wage law. The district court considered instead whether the California apprenticeship approval requirements "related to" an ERISA plan.

In *Hydrostorage* we held that section 1777.5, requiring compliance with a state-approved ERISA plan, was specifically designed to affect employee benefit plans. 891 F.2d at 730. *See Mackey*, 486 U.S. at 829 ("[W]e have virtually taken it for granted that state laws which are 'specifically designed to affect employee benefit plans' are pre-empted under § 514(a).").

The state argues that wage rate regulation is not preempted by ERISA. According to the state, the payment of wages is a traditional area of state regulation and is not an employee welfare benefit plan under ERISA. *See Morash*, 490 U.S. at 119. A similar argument was rejected in *National Elevator*, 957 F.2d at 1561. The Tenth Circuit pointed out that while the payment of wages alone does not give rise to an employee benefit plan, an apprenticeship training program is an employee benefit plan for

purposes of ERISA. *Id.* Therefore, as long as the prevailing wage law "relates to" an employee benefit plan, it need not *constitute* an employee benefit plan by itself.

The state argues that *Hydrostorage* should be differentiated because in *Hydrostorage*, the state mandated participation in an approved ERISA plan, while here the application of the prevailing wage law only encourages participation in an approved plan.

In *National Elevator*, the Tenth Circuit recognized this argument but found that like the statute in *Hydrostorage*, the application of a state's prevailing wage law to allow payment of lower apprenticeship wages to employees in approved apprenticeship programs "has the effect, and possibly the aim" of encouraging participation in state approved ERISA plans while discouraging participation in unapproved ERISA plans. *National Elevator*, 957 F.2d at 1559.

Given the Supreme Court's broad reading of ERISA's preemption clause we agree with the Tenth Circuit's conclusion that:

> If a state is permitted to use a prevailing wage scheme to single out certain ERISA plans over other ERISA plans, the potential for abuse is great – a state could avoid ERISA's preemption provision and covertly disturb or alter ERISA plans. . . . We hold that [the state's] ruling applying the state's prevailing wage law does "relate to" an employee benefit plan because the ruling's effects . . . are not "tenuous, remote, or peripheral." *See Shaw*, 463 U.S. at 100 n. 21.

Id. at 1561.

We conclude that the application of California's prevailing wage law in this case "relates to" an ERISA plan and thus falls under ERISA's preemption clause.

3. ERISA's savings clause

Federal laws and regulations issued under them are saved from ERISA preemption by the statute's "savings clause," which provides:

> Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any of the laws of the United States . . . or any rule or regulation issued under such law.

29 U.S.C. § 1144(d).

In *Shaw*, the Supreme Court held that a state law prohibiting discrimination in employee benefit plans on the basis of pregnancy was saved from ERISA preemption to the extent that it prohibited conduct unlawful under Title VII. *Shaw*, 463 U.S. at 102. However, this conclusion was based on the Court's finding that Title VII's enforcement scheme depended in part on state laws and that Title VII expressly preserves nonconflicting state laws. *Id.* at 101-102.

The Court noted that "ERISA's structure and legislative history . . . caution against applying [the savings clause] too expansively," and stated:

> While [the savings clause] may operate to exempt provisions of state laws upon which federal laws depend for their enforcement, the combination of Congress' enactment of an all-

> inclusive pre-emption provision and its enumeration of narrow specific exceptions to that provision makes us reluctant to expand [the savings clause] into a more general savings clause.

Id. at 104.

The issue presented in this case is whether a finding that the challenged application of California's prevailing wage law is preempted by ERISA would impair a federal law. The state argues that a finding of ERISA preemption would impair the federal Fitzgerald Act, which provides:

> The Secretary of Labor is authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, *to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship.* . . .

29 U.S.C. § 50 (emphasis added).

Pursuant to this enabling act, federal regulations have been promulgated at 29 C.F.R. § 29.1-29.13 (1988). These regulations "provide a 'detailed regulatory scheme defining apprenticeship programs and their requirements and establish a review, approval, and registration process for proposed apprenticeship programs administered by State Apprenticeship Councils under the aegis of the U.S. Dept. of Labor.' " *Hydrostorage*, 891 F.2d at 731 (quoting *Siuslaw Concrete Const. Co. v. Washington, Dept. of Trans.*, 784 F.2d 952, 956 (9th Cir. 1986)).

However, unlike Title VII, the Fitzgerald Act does not rely on state laws for enforcement and includes no clause "preserving" nonconflicting state laws. In *Hydrostorage*, we held the preemption of the state's attempt to enforce its apprenticeship standards did not impair the Fitzgerald Act or the regulations promulgated under it. We adopted the district court's reasoning, noting that "the regulations [under the Fitzgerald Act] relate only to eligibility for federal registration. Neither [the regulations] nor the Act itself contemplate enforcement mechanisms." *Hydrostorage*, 891 F.2d at 731.

The state argues that *Hydrostorage* should be read narrowly in light of our analysis in *MacDonald* where we noted that the federal regulations promulgated under the Fitzgerald Act provide "for a dual system of approval and recognition so that either" a federal or state apprenticeship council can approve an apprenticeship program for federal purposes. *MacDonald*, 949 F.2d at 273. The court in *MacDonald* held that the state's refusal to approve an apprenticeship program, pursuant to its own statutes and regulation, which had already been federally approved, went beyond the requirements of the Fitzgerald Act and was therefore not saved from ERISA preemption. However, the state reads *MacDonald* as implying that state apprenticeship standards are established under the Fitzgerald Act and that unless they require compliance with independent state standards apart from those set forth in the federal regulations under the Fitzgerald Act, they are saved from preemption.

We do not read *MacDonald* this broadly. As the Tenth Circuit concluded in *National Elevator*, the Fitzgerald Act "does not depend upon states to enforce its provisions; in

fact, there is nothing in [the Fitzgerald Act] for the states to enforce. [The Fitzgerald Act] merely seeks to facilitate development of apprenticeship programs – it does not mandate apprenticeship programs or seek to discourage other training programs." *National Elevator*, 957 F.2d at 1562. We conclude that even if the application of the prevailing wage law is in the furtherance of the objectives of the Fitzgerald Act, it is not an enforcement mechanism of federal law, and to the extent that its enforcement in this case is preempted by ERISA, federal law is not impaired. Therefore, the state's application of its prevailing wage law in this case is preempted by ERISA.

Because we find ERISA preemption, we do not address the NLRA preemption issue.

C. Proprietary Function of the State

The State argues that its actions in this case should be exempt from preemption both because it is acting as a market participant and because it is acting in its proprietary function rather than as a regulator in requiring Dillingham to pay prevailing wages.

We rejected a similar market participant argument in *Hydrostorage*. Although the underlying contract was a public works contract, we found that:

> California in this case is not acting merely as a "market participant" rather than a regulator. The state's involvement does not end with the awarding of the contract. Section 1777.5 is aimed at regulating contractors who work on public contracts. The Division [of Apprenticeship Standards], part of a state agency, monitors and enforces violations of section 1777.5. This amounts to regulation, not merely "market participation."

891 F.2d at 730.

Hydrostorage relied in part on *Wisconsin Dept. of Industry, Labor & Human Relations v. Gould*, 475 U.S. 282 (1986). In *Gould*, the Supreme Court held that a state statute debarring three-time violators of the NLRA from doing business with the state was preempted by the NLRA. The Court rejected a market participant argument, stating: "the 'market participant' doctrine reflects the particular concerns underlying the Commerce Clause, not any general notions regarding the necessary extent of state power in areas where Congress has acted. . . . What the Commerce Clause would permit the States to do in the absence of the NLRA is . . . an entirely different question from what States may do with the Act in place." *Id.* at 289-90.

The state argues that *Associated Builders & Contractors, Inc. v. City of Seward*, 966 F.2d 492 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1577 (1993) narrows *Hydrostorage* and our interpretation of *Gould*. In *City of Seward*, the court applied *Gould*, but found that the City was acting purely as a market participant when it required the winning bidder on a public works project to comply with a work-preservation clause in the City's contract. The work-preservation clause limited bidding on the project to contractors who agreed to enter an agreement with a union representing workers at a city-owned electric utility. The court stated:

> the City of Seward, unlike the State of Wisconsin in *Gould* . . . was not driven by regulatory concerns, but by legitimate management concerns that may lead any employer, public or private, to agree to a work preservation clause.

Id. at 496.

The state also contends that the recent Supreme Court case of *Building & Construction Trades Council of the Metropolitan District v. Associated Builders & Contractors of Mass./Rhode Island*, 113 S. Ct. 1190 (1993), supports its argument that no preemption should be found if a state is acting as a proprietor rather than as a regulator. In *Associated Builders*, a state agency hired a private firm to work as its project manager in its clean up of Boston Harbor. The firm negotiated an otherwise lawful prehire collective bargaining agreement which required (among other things) that all employees agree to be bound by the terms of the agreement and agree to become union members. The purpose of the agreement was to provide stability over the life of the project. The Court held that the NLRA did not preempt the agreement because the state was acting as a proprietor or owner of the construction project and its acts were not tantamount to regulation or policy making. *Id.* at 1196.

> When we say that the NLRA pre-empts state law, we mean that the NLRA prevents a State from regulating within a protected zone, whether it be a zone protected and reserved for market freedom, see *Machinists*, or for NLRB jurisdiction, see *Garmon*. A State does not regulate however, simply by acting within one of these protected areas. When a State owns and manages property . . . it must interact with

> private participants in the marketplace. In so doing, the State is not subject to pre-emption by the NLRA, because pre-emption doctrines apply only to state *regulation*.

Id. (emphasis added).

Both *City of Seward* and *Associated Builders* are NLRA cases. The NLRA contains no preemption clause. As the Court recognized in *Associated Builders*, a state's actions are only subject to preemption under the NLRA if it is *regulating* in a protected zone. *Id.* ERISA, on the other hand, contains a broad preemption clause under which any state law which "relates to" an employee benefit plan is preempted. *See, e.g., Ingersoll-Rand*, 498 U.S. at 139.

Additionally, these cases do not undermine the validity of our finding in *Hydrostorage* that the state in that case was not acting as a market participant. In *Hydrostorage*, we specifically found that the state was not acting merely as a market participant but that its enforcement of conditions of apprenticeship was aimed at regulating contractors who work on public contracts. This case is similar to *Hydrostorage*. The state's application of its prevailing wage law to require that apprentices in programs not approved by the state be paid higher wages than those in state-approved programs has the "effect and possibly the aim" of encouraging participation in a state-approved ERISA plan. *National Elevator*, 957 F.2d at 1559. Therefore, we conclude that the state's action in enforcing its prevailing wage law in this case goes beyond that of a mere market participant and is preempted by ERISA.

D. Damages Under 42 U.S.C. § 1983

Dillingham argues that it is entitled to an award of damages under 42 U.S.C. § 1983 because the state has deprived it of a federal right secured by the NLRA. Since we base reversal on a finding of ERISA preemption, we do not reach the issue of whether a finding of NLRA preemption would entitle Dillingham to recover damages under 42 U.S.C. § 1983. Additionally, we hold that Dillingham is not entitled to attorney's fees under 42 U.S.C. § 1988 because Dillingham has shown no right under section 1983 in ERISA which it has sought to enforce.

REVERSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DILLINGHAM CONSTRUCTION N.A., Inc., a California corporation, and Manuel J. Arceo, d/b/a SOUND SYSTEMS MEDIA, Plaintiffs, vs. COUNTY OF SONOMA; DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF LABOR STANDARDS ENFORCEMENT and DIVISION OF APPRENTICESHIP STANDARDS, administrative agencies of the State of California; GAIL W. JESSWEIN, in his official capacity as Chief of the Division of Apprenticeship; and JAMES CURRY, in his official capacity as Labor Commissioner, Defendant.	No. C 90-1272 FMS JUDGMENT (Filed Dec. 11, 1991)

For the reasons set forth in this Court's Order Granting Summary Judgment for Defendants dated December 11, 1991, judgment is hereby entered in favor of defendants and against plaintiffs.

The Clerk is directed to close the file.

SO ORDERED.

DATED: December 11, 1991

/s/ Fern M. Smith
FERN M. SMITH
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DILLINGHAM CONSTRUCTION N.A., Inc., a California corporation, and Manuel J. Arceo, d/b/a SOUND SYSTEMS MEDIA,	)	No. C 90-1272 FMS
Plaintiffs,	)	ORDER GRANTING SUMMARY JUDGMENT FOR DEFENDANTS
vs.	)	
COUNTY OF SONOMA; DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF LABOR STANDARDS ENFORCEMENT and DIVISION OF APPRENTICESHIP STANDARDS, administrative agencies of the State of California; GAIL W. JESSWEIN, in his official capacity as Chief of the Division of Apprenticeship; and JAMES CURRY, in his official capacity as Labor Commissioner,	)	(Filed Dec. 11, 1991)
Defendant.	)	

INTRODUCTION

At issue in this case is the State of California's authority to establish and enforce minimum employment standards for apprentices. The State of California (the "State") requires that public works contractors who employ apprentices employ only those apprentices who participate in apprenticeship programs with state-approved standards. Defendants in this case include two state agencies which enforce apprenticeship standards; the head of each of those agencies; and the County of

Sonoma. All defendants maintain that the State has the authority to establish and enforce minimum employment standards. Based on this authority, defendants have withheld money from plaintiffs for non-compliance with prevailing wage requirements that relate to apprentice status. Defendants have moved for summary judgment.

The plaintiffs, Dillingham Construction and Manuel J. Arceo, d/b/a Sound Systems Media ("Sound Systems"), argue that the State may not interfere in the collective bargaining process by trying to define apprentices. Plaintiffs claim that defendants' reasons for withholding the money are preempted by the Employee Retirement Income and Security Act of 1974, as amended, 29 U.S.C. §§ 1001-1381 ("ERISA") and/or the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA"). Plaintiffs have also moved for summary judgment.

For the reasons set forth below, defendants' Motion for Summary Judgment is GRANTED, and plaintiffs' Motion for Summary Judgment is DENIED.

BACKGROUND

Defendant County of Sonoma requested bids for the construction of a detention facility, known as the Sonoma County Main Adult Detention Facility (the "Project"). In the Spring of 1987, plaintiff Dillingham Construction won the construction contract and became the general contractor for the Project. The electronic installation work was subcontracted to co-plaintiff Manuel J. Arceo, d.b.a. Sound Systems Media ("Sound Systems").

Sound Systems asked Sonoma County for a determination of the appropriate prevailing rates applicable to all work on the Project.[1] Sonoma County gave Sound Systems the rate information requested, and Sound Systems claims that it paid its employees at or above the applicable prevailing rates.

When Sound Systems began work on the Project, it was signatory to a collective bargaining agreement with International Brotherhood of Electrical Workers ("IBEW") Local 202. The collective bargaining agreement included a scale for apprentice electronic technicians and required Sound Systems to make contributions to the Northern California Sound and Communications Joint Apprenticeship Training Committee ("No. Cal. JATC"). Joint Apprentice Training Committees ("JATCs" or "JACs") are the source of apprentices and provide for their training. The No. Cal. JATC was a state-approved JATC. In May 1988, a few months after Sound Systems began working on the project, IBEW Local 202 withdrew its representation of the electronics technician employees of Sound Systems.

In June of 1988, Sound Systems entered into a new collective bargaining agreement with the National Electronic Systems Technicians Union ("NESTU"). The NESTU agreement covered Sound Systems' electronic technicians and included a scale of wages for apprentices. NESTU was associated with a new JATC, the Electronic and Communications Systems Joint Apprenticeship and

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[1] The detention facility project was a public works project within the meaning of California Labor Code section 1720.

Training Committee ("E & C JATC"). The E & C JATC had not yet been approved by the state when Sound Systems began relying on it for apprentices to work on the Project. This is the transgression that created the present litigation. The E & C JATC applied for state approval in August of 1989 and received it in October 1990. The approval was not retroactive.

On March 14, 1989, the IBEW Local 551 filed a complaint against Sound Systems with the Division of Apprenticeship Standards ("DAS") of the California Department of Industrial Relations ("DIR"), an administrative agency, alleging violations of California Labor Code section 1777.5, which concerns apprenticeship programs. Although IBEW Local 551 withdrew its complaint, defendant DAS issued a notice of noncompliance to plaintiffs Dillingham Construction and Sound Systems, and the Division of Labor Standards Enforcement issued a Notice To Withhold. The Notice directed the County of Sonoma to withhold monies from Dillingham based on Sound Systems' violations. The basis for the Notice was that plaintiffs had paid some of their workers less than prevailing wages, in violation of Labor Code section 1771. The amount of money withheld equaled the unpaid wages and penalties for failure to pay such wages.

Plaintiffs do not dispute that Sound Systems paid some of its workers less than the prevailing wages for journeymen, but claim that those workers were apprentices and that Sound Systems was entitled to pay those individuals less than journeyman prevailing wage rates, pursuant to the NESTU collective bargaining agreement.

Defendants' basic argument is that there were no apprentices working for Sound Systems because there were no "apprentices" listed on Sound Systems' payroll worksheets; more importantly, there was no approved JAC from which Sound Systems could hire "apprentices". Since there were no true "apprentices",[2] all employees should have been paid the prevailing wage for journeymen.[3]

California's administrative framework for regulating apprenticeships is complex. Rules and regulations establishing minimum standards of wages, hours, and working conditions for apprentices are created by the California Apprenticeship Council ("CAC") under the authority of California Labor Code section 3071 and promulgated at title 8 of the California Code of Regulations (§§ 200 *et seq.*) The CAC is located within the DAS. Section 212 of

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[2] An apprentice is defined as "a person at least 16 years of age who has entered into a written agreement, in this chapter called an 'apprentice agreement', with an employer or program sponsor. The term of the apprenticeship for each apprenticeable occupation shall be approved by the chief, and in no case shall provide for less than 2,000 hours of reasonably continuous employment for such person and for his or her participation in an approved program of training through employment and through education in related and supplemental subjects." Cal. Lab. Code § 3077 (West 1989).

[3] State-recognized apprentices have entered into apprenticeship agreements with JATCs to ensure apprentices proper training. There is no evidence in the record of apprenticeship agreements here, nor evidence that Sound Systems' "apprentices" received any training. *See* Declaration of M. Arceo at 4: "Installer apprentices receive no formal electronic training and engage in cable pulling tasks such as speaker hanging". Cable pulling is not an apprenticeable trade.

the regulations provides that "[a]pprenticeship programs shall be established by written standards approved by the Chief of DAS" and sets forth a detailed list of program standards that must be covered before the program is approved. Cal. Code Regs tit. 8, § 212.

The CAC exercises approval authority over apprenticeship programs pursuant to the Fitzgerald Act, 29 U.S.C. § 50, and its implementing regulations, 29 C.F.R. §§ 29.1 - 29.13. The federal regulations establish criteria under which the Bureau of Apprenticeship and Training (BAT) of the United States Department of Labor may recognize a State agency as the appropriate agency for registering local apprenticeship programs for federal purposes. 29 C.F.R. § 29.12. The CAC has at all times relevant to this action been formally recognized by the BAT as authorized to register and approve apprenticeship programs pursuant to the Fitzgerald Act and its regulations.[4]

Plaintiffs assert that California's prevailing wage and apprenticeship standards are preempted by ERISA and the NLRA. This Court finds that the wage and apprenticeship standards at issue here, and the DAS's enforcement of them, are not preempted by either of these statutes.

PROCEDURAL POSTURE

This Court has jurisdiction under 28 U.S.C. § 1331. Federal courts have jurisdiction over suits to enjoin state

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[4] The federal regulations also provide for the BAT directly to register apprenticeship programs as conforming with federal standards for federal purposes. 29 C.F.R. § 29.3.

officials from interfering with federal rights. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 88 n. 14 (1983) *citing Ex parte Young*, 209 U.S. 123, 160-62 (1908); *see also Hydrostorage Inc. v. Northern California Boilermakers*, 891 F.2d 719, 724-25 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 72 (1990).

The issue before the Court is the requirement that public works contractors who use apprentices use only those from state approved apprenticeship programs. The legality or illegality of the approval requirement in the face of the preemption arguments is dispositive.

Although the parties disagree as to whether or not plaintiffs employed "apprentices," they do agree that plaintiffs did not employ apprentices from a State approved program. There being no material facts in dispute, summary judgment is appropriate. Fed. R. Civ. P. 56 (c).

ANALYSIS

Plaintiffs base their motion for summary judgment on two theories: 1) apprenticeship standards constitute an employee welfare benefit plan; as such, state laws regulating such standards are preempted by the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001-1381 ("ERISA"); and 2) state mandated prevailing wage rates in excess of collectively bargained-for wage rates are not true minimums and, therefore, are preempted by the National Labor Relations Act, 29 U.S.C. § 151 et seq. ("NLRA").

A. ERISA Preemption

Plaintiffs present a rather simple syllogism in support of their ERISA preemption argument: 1) ERISA preempts all state laws relating to employee welfare benefit plans; 2) California's apprenticeship standards are employee welfare benefit plans; 3) ERISA, therefore, preempts California laws relating to apprenticeship standards. In support of this argument, plaintiffs cite *Hydrostorage, Inc. v. Northern California Boilermakers*, 891 F.2d 719 at 728. The Court finds that *Hydrostorage* settles the two premises of this analysis, but does not dictate the proffered conclusion.

The plaintiff in *Hydrostorage* was awarded a public works contract to construct a water storage tank for a county water district. Plaintiff neither applied to the relevant Joint Apprenticeship Committee (JAC) for certificate of approval *nor employed any apprentices on the project. Hydrostorage*, 891 F.2d at 722-23. Investigating a complaint, the Director determined that a violation had occurred. The determination was appealed to, and affirmed by, the CAC, which agreed that plaintiff had violated section 1777.5.

According to Cal. Lab. Code section 1777.5, California contractors working on public works contracts, with certain exceptions not relevant here, must:

> (1) "apply to the joint apprenticeship committee administering the apprenticeship standards of the craft or trade in the area of the site of the public work for a certificate approving the contractor or subcontractor under the apprenticeship standards for the employment and training

> of apprentices in the area or industry affected"; (2) employ apprentices in a ratio of no less than one apprentice for every five journeymen; and (3) contribute to the fund or funds in each craft or trade in which [the contractor] employs journeymen or apprentices on the public work. . . .

Hydrostorage, 891 F.2d at 722, *citing* Cal. Lab. Code § 1777.5. Hydrostorage violated section 1777.5 by failing to apply for a certificate of approval, *failing to employ apprentices*, and failing to contribute to the appropriate fund. *Hydrostorage*, 891 F.2d at 722-23. The DAS, as affirmed by the CAC, issued an administrative order barring Hydrostorage from future public works contracts. The district court found enforcement of the order preempted by ERISA. The Ninth Circuit affirmed.

The Ninth Circuit's three-part analysis of ERISA preemption in *Hydrostorage* is instructive. That court considered: (1) whether the standards at issue fell within ERISA's regulatory scope; (2) whether ERISA's preemption clause reached state laws relating to the same standards; and (3) whether ERISA's savings clause for federal laws saved the standards from ERISA preemption.

1. ERISA Employee Welfare Benefit Plans

In *Hydrostorage*, the Ninth Circuit first considered whether the CAC-approved apprenticeship standards established by the Northern California Boilermakers' JAC constituted an ERISA "employee welfare benefit plan." 891 F.2d at 728. The JAC's standards consisted of the minimum qualifications for apprentices, the maximum

ratio of apprentices to journeymen, the terms and conditions of apprenticeships and the hours and wages of apprentices. *Id.*, at 728. The court found that, because ERISA expressly defines "employee welfare benefit plan" to include apprenticeship and training programs established by "an employer or . . . employee organization, or . . . both," 29 U.S.C. § 1002(1),[5] the JAC's standards constituted an ERISA employee welfare benefit plan. *Hydrostorage*, 891 F.2d at 728.

The *Hydrostorage* analysis is relevant here because the program that Sound Systems purported to establish was an "apprenticeship or other training program" within the meaning of 29 U.S.C. section 1002(1).

2. ERISA's Preemption Clause

Second, the Ninth Circuit in *Hydrostorage* addressed whether or not the administrative order fell within ERISA's preemption clause. *Id.* at 729. ERISA's preemption clause provides:

> [T]he provisions of this subchapter . . . shall supersede any and all *State laws* insofar as they

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[5] Section 1002(1) defines an ERISA employee welfare benefit plan as "any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, . . . or vacation benefits, *apprenticeship* or other training programs. . . . " *Id.* (emphasis added).

> may now or hereafter *relate to* any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. § 1144(a) (emphasis added). Holding that the administrative order fell within ERISA's definition of "State laws,"[6] the court further found that it "relates to" an ERISA employee benefit plan. *Hydrostorage*, 891 F.2d at 729-30. A state law "relates to" an employee benefit plan "if it has a connection with or reference to such a plan." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987), *citing Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96-97 (1983).

In addition to requiring that an administrative order be a "state law" that "related to" an ERISA plan, the court said that the order must also "purport to regulate" directly or indirectly an ERISA plan before it is pre-empted. *Id.* at 729. A state law "purports to regulate" a plan if it "attempts to reach in one way or another the terms and conditions of employee benefit plans." *Id.* at 729, *quoting Local Union 598 v. J.A. Jones Constr. Co.*, 846 F.2d 1213, 1218 (9th Cir.) *aff'd* 488 U.S. 881 (1988). The *Hydrostorage* court held that the DAS order and § 1777.5, the underlying statute upon which it was based, were "specifically designed to affect employee benefit plans." *Hydrostorage*, 891 F.2d at 730. While the court held that the administrative order fell within ERISA's preemption

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[6] State means "a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly the terms and conditions of employee benefit plans . . . " 29 U.S.C. § 1144(c)(2).

clause, *id.*, it did not extend its analysis to section 1777.5 itself. *Id.*, at 732.

Here, California's approval scheme for apprenticeship programs lies within the reach of ERISA's preemption clause. State approval is required so that plaintiff will be bound by the State's apprenticeship standards *vis-a-vis* an approved JAC; therefore, the approval requirement appears to "relate to" an ERISA plan. Furthermore, the State's approval requirement "purports to regulate" an ERISA plan by requiring review of the terms and conditions of apprenticeship standards. ERISA, however, "does not regulate the substantive content of welfare-benefit plans." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985).

3. ERISA's Savings Clause

As a third and final step in its analysis, the Ninth Circuit in *Hydrostorage* considered the State's contention that, even if the programs at issue fell within the broad language of ERISA's preemption provision, ERISA's savings clause protected it from preemption. ERISA's saving clause provides that "[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under such law." 29 U.S.C. § 1144(d).

Congress has spoken to the relationship between the states and apprenticeship standards in the Fitzgerald Act:

> The Secretary of Labor is authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, . . . to bring

> together employers and labor for the formulation of apprenticeship, *to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship*. . . .

29 U.S.C. § 50 (emphasis added).

The federal regulations promulgated under the Fitzgerald Act are set forth at 29 C.F.R. §§ 29.1-29.13. Those regulations provide "a detailed regulatory scheme defining apprenticeship programs and their requirements, and establish a review, approval, and registration process for proposed apprenticeship programs administered by State Apprenticeship Councils under the aegis of the United States Department of Labor." *Siuslaw Concrete Constr. Co. v. Washington Dep't of Transp.*, 784 F.2d 952, 956 (9th Cir. 1986).

In *Hydrostorage*, the Ninth Circuit rejected the State's argument that ERISA's "savings clause," through the Fitzgerald Act, saved from preemption its requirement that public works contractors hire apprentices and perform all the attendant responsibilities. *Hydrostorage*, 891 F.2d at 731-32. The court adopted the district court's conclusion that "by no stretch of the imagination could § 1777.5 be considered a state law the preemption of which would impair federal law:"

> The implementing regulations [of the Fitzgerald Act] state that their purpose is "to set forth labor standards to safeguard the welfare of apprentices, and to extend the application of such standards by prescribing policies and procedures concerned with the registration, for certain Federal purposes, [of] acceptable apprenticeship programs. 29 C.F.R. § 29.1(b).

> Thus the regulations relate only to eligibility for federal registration. Neither [the regulations] nor the Act itself contemplate enforcement mechanisms. . . . Assuming § 1777.5 was adopted in furtherance of the objectives of the Fitzgerald Act, it clearly is not an enforcement mechanism of federal law and to the extent orders under this section are preempted by ERISA, federal law is not impaired.

Hydrostorage, 685 F. Supp. at 722 (N.D. Cal. 1988). The Fitzgerald Act neither "articulate[s] a 'goal of encouraging joint state/federal enforcement' " nor "contain[s] a clause which preserves state laws." *Hydrostorage*, 891 F.2d at 732.

The Ninth Circuit recently clarified the extent to which ERISA's savings clause protects from preemption state laws regulating apprenticeships in *Electrical Joint Apprenticeship Committee, et al. v. MacDonald*, No. 90-15095 (9th Cir. November 8, 1991). There, the court considered the State of Nevada's enforcement of its prevailing wage statute governing state public works projects, which exempts apprentice programs approved by the Nevada State Apprenticeship Council (SAC), but does not exempt programs already approved directly by the federal BAT. Though the Court found the state's effort to subject BAT-approved apprenticeship programs to state SAC approval requirements preempted by ERISA, its opinion makes clear that, notwithstanding the sweeping language of *Hydrostorage*, the states can continue to exercise roles in apprenticeship regulation that are not preempted by ERISA.

The court in *MacDonald* found that ERISA's savings clause saves from preemption the Fitzgerald Act, and further explained that

> [t]here is no exemption from the broad preemption provision of section 514(a) of ERISA *except for* the federal Fitzgerald Act and the regulations issued thereunder . . . Thus, any state regulation of apprenticeship programs that is separate and apart from the authorization given by the Fitzgerald Act and its accompanying regulations is preempted by section 514(a) of ERISA.

Id. at 15249 (emphasis added). The court also made clear that both the BAT and the federally-authorized state agencies exercise non-preempted approval functions under the Fitzgerald Act and its regulations:

> 29 C.F.R. § 29.3 provides for a dual system of approval and recognition so that either the BAT or the State Apprenticeship Council can approve an apprenticeship program for federal purposes. However, either agency is constrained in its approval to apply the requirements and standards of the federal regulations.

Id. at 15248. Because the BAT had already authorized the apprenticeship program at issue, yet the SAC asserted jurisdiction over and withheld approval of the same program pursuant to its own statutes and regulations, the state was, in essence, stepping outside the Fitzgerald Act spotlight into the pervasive darkness of ERISA preemption. *Id.* at 15249-50.

Here, we are not concerned only with the state's effort to force a public works contractor to establish an ERISA plan, as in *Hydrostorage*, or with a conflict between

federal and state approvals, as in *MacDonald*. We are concerned with a state's right to require employers who wish to pay employees apprentice wages, thereby benefiting from a limited exemption from the state's hour-and-wage laws, to obtain prior state approval of their apprenticeship programs.

The State approval requirement insures the integrity of apprenticeship programs and protects the public and would-be apprentices from fraudulent programs which result in inadequately-trained or abandoned apprentices. The Court finds that this purpose falls squarely within the state's delegated jurisdiction under the Fitzgerald Act as articulated in the Fitzgerald Act itself and in its regulations:

> The purpose of this part is to set forth labor standards to safeguard the welfare of apprentices, and to extend the application of such standards by prescribing policies and procedures concerning the registration, for certian [sic] Federal purposes, of acceptable apprenticeship programs with the U.S. Department of Labor. . . . These labor standards, policies and procedures cover the registration, cancellation and deregistration of apprenticeship programs and of apprenticeship agreements; the recognition of a State agency as the appropriate agency for registering local apprenticeship programs for certain Federal purposes; and matters relating thereto.

29 C.F.R. § 29.1. Preemption of the state approval requirement would unquestionably impair the purposes of the Fitzgerald Act and its regulations within the meaning of

ERISA's savings clause.[7] Therefore, the state approval requirement is saved from preemption.[8]

California's authority to establish and enforce minimum apprenticeship standards is, for these reasons, saved from ERISA preemption.

B. NLRA Preemption

Defendants withheld monies from plaintiff Dillingham on the basis that plaintiff Sound Systems paid

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[7] In addition, several other laws of the United States acknowledge and accommodate the validity of State apprenticeship standards. *See* 42 U.S.C. § 1257 (National and Community Service Act of 1990, limiting the use of certain benefits to those covering "expenses incurred in the fulltime participation in an apprenticeship program approved by the appropriate State agency"); 20 U.S.C. § 2331, 2382 and 2471 (state apprenticeship programs and vocational education); 23 U.S.C. § 140(a) (state apprenticeship programs and federal highways); 38 U.S.C. § 1787(a)(1) (state apprenticeship programs and veterans). Because it finds that the Fitzgerald Act saves the state approval requirement from preemption, the Court does not reach whether ERISA preemption would impair any of these other laws.

[8] Supplemental authority submitted by the plaintiffs is distinguishable from the instant case, because, *inter alia*, those courts never reached a savings clause analysis. *See. e.g., Boise Cascade Corp. v. Peterson*, 939 F.2d 632 (8th Cir. 1991) (reversing district court finding that apprenticeship ratio regulations did not constitute an ERISA benefit plan); *Carpenters S. California Admin. Corp. v. El Capitan Dev. Co.*, 53 Cal. 3d 1041 (1991) (holding preempted a statute which created liens on real property for the benefit of collectively bargained trust funds); *Associated Builders and Contractors v. Baca*, 769 F. Supp. 1537 (N.D. Cal. 1991) (finding preemption of local ordinances regarding per diem wages on private works).

less than prevailing wage to some of its employees. Those prevailing wage rates are above the rates set for apprentices in the NESTU collective bargaining agreement, to which Sound Systems is a party. Plaintiffs contend that defendants are preempted by the National Labor Relations Act from enforcing the prevailing wage rates, because the rates interfere with the collective bargaining process. Defendants, on the other hand, assert that the prevailing wage issue is linked to the apprenticeship approval requirement. The requirement incorporates minimum labor standards and is therefore not preempted by the NLRA. For the reasons set forth below, the Court finds that the State's minimum apprenticeship labor standards are not preempted by the NLRA.

Unlike ERISA, the NLRA contains no statutory preemption provision. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985). Notwithstanding the NLRA, "[s]tates possess broad authority under their police powers to regulate the employment relationship within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety . . . are only a few examples." *Id.* at 756, *quoting De Canas v. Bica*, 424 U.S. 351, 356 (1976). *Cf. Siuslaw Concrete Constr. Co. v. Washington Dep't of Transp.*, 784 F.2d 952, 958 (9th Cir. 1986) (upholding state law mandating higher minimum wage rates for trainees than provided under federal law: "[t]he Washington statute is a minimum wage law enacted by the State as an exercise of its police power.")

The Supreme Court, however, has articulated two distinct NLRA preemption principles. *Metropolitan Life*, 471 U.S. at 748. First, there is the so-called *Garmon* rule,

which "protects the primary jurisdiction of the NLRB [National Labor Relations Board] to determine in the first instance what kind of conduct is either prohibited or protected by the NLRA." 471 U.S. at 748, *citing San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). The second is the *Machinists* principle, which

> protects against state interference with policies implicated by the structure of the [NLRA] itself, by pre-empting state law and state causes of action concerning conduct that Congress intended to be unregulated. The doctrine was designed, at least initially, to govern pre-emption questions that arose concerning activity that was neither arguably protected against employer interference [citation], nor arguably prohibited as an unfair labor practice [citation]. Such action falls outside the reach of *Garmon* pre-emption.

471 U.S. at 749, *citing International Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976); *see also New York Tel. Co. v. New York State Dept. of Labor*, 440 U.S. 519, 529-531 (1979). Neither of the two theories preempt the State from establishing and enforcing minimum apprenticeship standards.

Plaintiffs claim that *Garmon* preemption is present here because workers' wage rates are governed by the collective bargaining process and protected by section 7 of the NLRA. Section 7 of the NLRA provides:

> Employees shall have the right to selforganization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted aid or protection, and shall also have

> the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title.

29 U.S.C. § 157. *Garmon* held that:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the [NLRA] . . . due regard for the federal enactment requires that state jurisdiction must yield.

Garmon, 359 U.S. at 244.[9]

The key to plaintiffs' NLRA preemption argument is not *Garmon* itself, but a Ninth Circuit decision applying *Garmon: Bechtel Constr., Inc. v. United Bhd. of Carpenters*, 812 F.2d 1220, 1225 (9th Cir. 1987). *Bechtel*, however, is distinguishable.

In *Bechtel*, the Bechtel Construction company contracted to provide construction maintenance at the San Onofre Nuclear Generating Station (apparently a private

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[9] In *Garmon*, the NLRB had declined to exercise jurisdiction over the dispute in question, after which the state courts had assumed jurisdiction. The Supreme Court held that the "refusal of the [NLRB] to assert jurisdiction did not leave with the States power over activities they otherwise would be pre-empted from regulating," 359 U.S. at 238, so that the state courts' assumption of jurisdiction was improper. As the Supreme Court explained in *Metropolitan Life*, the purpose of the *Garmon* rule is to protect the primary jurisdiction of the NLRB. *Metropolitan Life*, 471 U.S. at 748.

works project). Bechtel was signatory to a national agreement between the General Presidents Committee ("GPC") and various maintenance contractors. The agreement was known as the "GPPM agreement" and applied to the San Onofre project. The GPPM agreement did not discuss wage rates or terms of employment for apprentices, yet the San Onofre project employed apprentices.

The San Onofre apprentices were to be trained by the contractor pursuant to an Apprenticeship Agreement. Bechtel and the local JAC signed the Apprenticeship Agreement, which was then approved by the Division of Apprenticeship Standards ("DAS"). The agreement incorporated "all Apprenticeship Standards of the Division, *including wage rates.*" *Bechtel*, 812 F.2d at 1221 (emphasis added).

During the performance of the contract, Bechtel announced that it sought a wage reduction at San Onofre. Without seeking to modify the Apprenticeship Agreement, Bechtel received approval for its proposed reduction from the GPC and, thereafter, reduced all wage rates — including the apprentices'. Several apprentices filed complaints with the Division of Labor Standards Enforcement ("DLSE") seeking due and unpaid wages. In response, Bechtel filed an action in the district court seeking declaratory and injunctive relief. The district court found, and the Ninth Circuit affirmed, that "under California law, state minimum wage standards for apprentices do not apply where there is a collective bargaining agreement. . . . " *Id.* at 1222.

The Ninth Circuit's opinion addressed, first, whether California's apprenticeship *wage* standards were legal

minimums, *id.* at 1222-25, and second, the NLRA's preemptive effect on state agencies attempting to enforce apprenticeship standards. *Id.* at 1225-26.

In the first part of its opinion, the court held that the apprentice wage standards were not legal floors and the State had no jurisdiction over claims for unpaid wages arising under collective bargaining agreements. *Id.* at 1223-24. The court carefully distinguished the issue before it from the "legal minimum" exception to NLRA preemption articulated in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), wherein the Court held that "[w]hen a state law establishes a minimal employment standard not inconsistent with the federal legislative goals of the NLRA, it conflicts with none of the purposes of the Act." *Id.* at 757.[10]

The apprenticeship wage standards in Bechtel were not true legal minimums in the *Metropolitan Life* sense, because "California law places the collective bargaining agreement over the Approved Standards for Apprentices in *setting wages for apprentices*. . . . 812 F.2d at 1225 (emphasis added). According to the *Bechtel* court, California's regulations and statutes suggest that "wage progression schedules" or "wage scales" should be in accordance with and secondary to collective bargaining agreements. *Id.* at 1222.

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[10] *Metropolitan Life* involved a Massachusetts statute requiring specified minimum mental health care benefits for Massachusetts employees. The Court held that this was a minimal employment standard and not preempted by the NLRA.

Plaintiffs have read the *Bechtel* holding to say that "prevailing wage rates are secondary to collectively-bargained wage rates." Plaintiffs then claim that, since prevailing wage rates are not true minimums, defendants may not force them to pay anything over the NESTU collectively bargained-for apprentice wage rate. According to plaintiffs, because prevailing wage rates are not *Metropolitan Life* legal minimums, they are preempted by the NLRA. *Bechtel*, however, does not address "prevailing wage rates."

More important, the "true legal minimum" at issue in the present case is not the NESTU apprentice *wage* standard, but apprentice *qualification* standards; *i.e.*, whether the apprenticeship program includes appropriate levels of education, training, and supervision.[11] The State simply seeks to enforce its requirement that public works contractors employing apprentices employ only state-approved apprentices. Ordained/approved apprentices are those who participate in state approved programs, *i.e.*, programs that guarantee training in exchange for lower wages. DAS does *not* claim that the NESTU wage scale is too low, or that anyone who was in the legal category of apprentice be paid a higher proportion of pay in relation to the journeymen as was the case in *Bechtel*. Rather, DAS asserts that because plaintiffs do not employ "apprentices," they must pay prevailing wages. If Sound Systems had properly hired apprentices from a program

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[11] Contrast *Associated Builders and Contractors v. Baca*, 769 F. Supp. 1537, in which certain localities offered a choice between paying certain per diem wages and posting a completion bond, thereby undercutting the stated objective of public safety.

approved by the state, in a craft recognized as "apprenticeable" under prevailing wage law, it could have paid them according to any legal collective bargaining agreement in effect.

Wage rates are at issue only because the State requires plaintiffs to pay journeymen's prevailing wage rates to non-indentured apprentices. Plaintiffs have to pay prevailing wages because that is what they contracted to do, as they have conceded.[12]

The issue before this Court is the State's authority to require apprenticeship program approval, not the State's authority to preempt the collective bargaining process when it comes time to adjust apprentices' wage standards – the claimed authority which was struck down in *Bechtel*.

In the second part of *Bechtel*, the court observed that the *Garmon* rule prohibits the state from regulating any activity that the NLRA protects, prohibits or arguably protects or prohibits, and held that section 7 of the NLRA "preempt[s] any attempt to enforce the Approved Standards against collectively bargained-for wage rates." 812 F.2d at 1225. The court rejected the JAC's argument that the wage standards established a minimum employment standard within the meaning of *Metropolitan Life*, finding that they were not true minimums because they could be undercut through negotiations approved by the DAS. "A

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[12] As previously noted, "Sound Systems requested a determination by the County of Sonoma regarding the appropriate prevailing rates applicable to all work performed on the Detention Facility project." After receiving the figures, Sound Systems claims to have paid its employees on the Project at or above the prevailing wage levels quoted by the County.

'minimum' by definition cannot be undercut. *Metropolitan Life* concerned state legislation establishing true minimum labor standards as an exercise of the state's police power." *Bechtel*, 812 F.2d at 1225-26.

The plaintiffs here argue that, under *Bechtel*, the State's prevailing wage law does not establish true minimums because, the approval of an apprenticeship program authorizes lower wage levels. This argument misses the mark, because the minimums at issue here relate to appropriate education and training in apprenticeship programs. Nothing in California's statutory scheme indicates that those standards may be undercut:

> Nothing in this chapter or in any apprentice agreement approved under this chapter shall operate to invalidate any apprenticeship provision in any collective agreement between employers and employees setting up *higher* apprenticeship standards.

Cal. Labor Code § 3086 (emphasis added).

> The California Apprenticeship Council shall issue rules and regulations which establish standards for minimum wages, maximum hours, and working conditions for apprentice agreements, . . . referred to as apprenticeship standards, which *in no case shall be lower* than those prescribed by this chapter. . . .

Cal. Lab. Code § 3071 (emphasis added). California's apprenticeship standards requiring education and training are true minimums that may not be undercut; therefore, they are true minimum employment standards not preempted by the NLRA.

Minimum employment standards have virtually no effect on the collective bargaining process, and only an indirect effect on the right of self-organization established in section 7 of the NLRA. *Metropolitan Life*, 471 U.S. at 755.

> Unlike the NLRA, mandated-benefit laws are not laws designed to encourage or discourage employees in the promotion of their interests collectively; rather, they are in part "designed to give specific minimum protection to *individual* workers and to ensure that *each* employee covered by the Act would receive" the mandated [minimum protection].

Id., quoting Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 739 (1981). Section 7 of the NLRA does not preempt California from establishing or enforcing its minimum apprenticeship standards.

Nor are minimum apprenticeship standards preempted by the *Machinists* principle. *International Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). Under *Machinists* preemption, the Court must consider whether Congress purposely left open the opportunity for the states to establish minimum apprenticeship standards by not legislating in that area. *See New York Tel. Co. v. New York State Dept. of Labor*, 440 U.S. 519 (1979). Where the preemptive effect of federal enactments is not explicit,

> courts sustain a local regulation 'unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States.'

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 209 (1985), *quoting Malone v. White Motor*, 435 U.S. 497, 504 (1978).

Congress has not attempted to occupy the field of apprenticeship standards. The Fitzgerald Act expressly contemplates states creating their own standards. *Siuslaw Concrete Constr. Co. v. Washington Dep't of Transp.*, 784 F.2d 952, 955-58 (9th Cir. 1986). *See also* 42 U.S.C. § 12576 (State apprenticeship programs and the National and Community Service Act); 20 U.S.C. § 2331, 2382 and 2471 (State apprenticeship programs and vocational education); 23 U.S.C. § 140(a) (State apprenticeship programs and federal highways); 38 U.S.C. § 1787(a)(1) (State apprenticeship programs and veterans). The Court therefore concludes that *Machinists* preemption does not apply.

Plaintiffs have also asserted a civil rights claim pursuant to 42 U.S.C. section 1983. At the hearing on December 12, 1990, the Court granted plaintiffs' motion to amend the complaint to attempt to state a cognizable section 1983 claim.

Plaintiffs base their claim on alleged infringement of their right to collectively bargain under the NLRA. The section 1983 argument, however, is contingent upon defendants' being preempted by the NLRA from enforcing the State's minimum apprenticeship standards. The Court finds no violation of plaintiffs' rights under the NLRA; therefore, the section 1983 claim fails.

CONCLUSION

The State has the right to establish and enforce its own minimum apprenticeship standards. That right is not

preempted by either ERISA or the NLRA. One of the mechanisms for enforcing the standards is to require that apprenticeship programs receive approval from the state before apprentices may be hired on public works projects. Only then can the workers truly be classified as apprentices. Once classified as apprentices, the State permits employers to pay them lower than prevailing wage rates, assured that, in exchange for lower wages, the appentices are receiving appropriate training and education. Plaintiffs did not hire from an approved apprenticeship program during the period at issue here; therefore, the State did not have those assurances and properly found a violation of section 1771.

The state approval requirement is essential to the State's effective enforcement of its prevailing wage law. The power to establish and enforce minimum employment standards falls squarely within the State's legitimate exercise of its police power. If the State were not able to require that apprenticeship programs be approved before employers may pay workers less than prevailing wages, then the apprenticeship system would become a wide-open loophole through which employers could hire and underpay workers on state public works contracts without offering them the legitimate benefits of apprenticeship status. Is is inconceivable that either ERISA or the NLRA could be logically intended or construed to dictate this result.

For all the reasons stated herein, plaintiffs' motion for summary judgment is DENIED. Defendants' motions for summary judgment are GRANTED. The Court need

not reach defendant County of Sonoma's motion to dismiss.

SO ORDERED.

DATED: Dec. 11, 1991

/s/ Fern M. Smith
FERN M. SMITH
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DILLINGHAM CONSTRUCTION N.A., INC., a California Corporation; MANUEL J. ARCEO, dba SOUND SYSTEMS MEDIA, Plaintiffs-Appellants, v. COUNTY OF SONOMA; DIVISION OF LABOR STANDARDS ENFORCEMENT; DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF APPRENTICESHIP STANDARDS, et al., Defendants-Appellees.	No. 92-15247 D.C. No. CV-90-01272-FMS ORDER (Filed Jul. 19, 1995)

BEFORE: CANBY and BRUNETTI, Circuit Judges, and JONES,** District Judge

The panel has voted to deny the petition for rehearing.

Circuit Judges Canby and Brunetti have voted to reject the suggestion for rehearing en banc. District Judge Jones has voted to recommend the rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has

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**Honorable Robert E. Jones, United States District Judge for the District of Oregon, sitting by designation.

requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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29 U.S.C. § 50 (1994)

§ 50. Promotion of labor standards of apprenticeship

The Secretary of Labor is authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship, and to cooperate with the Secretary of Education in accordance with section 17 of Title 20. For the purpose of this chapter the term "State" shall include the District of Columbia.

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29 U.S.C. § 1144(a) (1994)

§ 1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

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29 U.S.C. § 1144(d)(1994)

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of the United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(c) of this title) or any rule or regulation issued under any such law.

Cal. Lab. Code § 1777.5 (WEST 1995)

§ 1777.5. Apprentices – Employment upon Public Works

Nothing in this chapter shall prevent the employment of properly registered apprentices upon public works.

Every such apprentice shall be paid the standard wage paid to apprentices under the regulations of the craft or trade at which he or she is employed, and shall be employed only at the work of the craft or trade to which he or she is registered.

Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards and written apprentice agreements under Chapter 4 (commencing with Section 3070) of Division 3, are eligible to be employed on public works. The employment and training of each apprentice shall be in accordance with the apprenticeship standards and apprentice agreements under which he or she is training.

When the contractor to whom the contract is awarded by the state or any political subdivision, or any subcontractor under him or her, in performing any of the work under the contract or subcontract, employs workers in any apprenticeable craft or trade, the contractor and subcontractor shall apply to the joint apprenticeship committee administering the apprenticeship standards of the craft or trade in the area of the site of the public work for a certificate approving the contractor or subcontractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected. However, approval as established by the joint

apprenticeship committee or committees shall be subject to the approval of the Administrator of Apprenticeship. The joint apprenticeship committee or committees, subsequent to approving the subject contractor or subcontractor, shall arrange for the dispatch of apprentices to the contractor or subcontractor in order to comply with this section. Every contractor and subcontractor shall submit contract award information to the applicable joint apprenticeship committee which shall include an estimate of journeyman hours to be performed under the contract, the number of apprentices to be employed, and the approximate dates the apprentices will be employed. There shall be an affirmative duty upon the joint apprenticeship committee or committees administering the apprenticeship standards of the craft or trade in the area of the site of the public work to ensure equal employment and affirmative action in apprenticeship for women and minorities. Contractors or subcontractors shall not be required to submit individual applications for approval to local joint apprenticeship committees provided they are already covered by the local apprenticeship standards. The ratio of work performed by apprentices to journeymen who shall be employed in the craft or trade on the public work may be the ratio stipulated in the apprenticeship standards under which the joint apprenticeship committee operates, but, except as otherwise provided in this section, in no case shall the ratio be less than one hour of apprentices work for every five hours of labor performed by a journeyman. However, the minimum ratio for the land surveyor classification shall not be less than one apprentice for each five journeymen.

Any ratio shall apply during any day or portion of a day when any journeyman, or the higher standard stipulated by the joint apprenticeship committee, is employed at the job site and shall be computed on the basis of the hours worked during the day by journeymen so employed, except for the land surveyor classification. The contractor shall employ apprentices for the number of hours computed as above before the end of the contract. However, the contractor shall endeavor, to the greatest extent possible, to employ apprentices during the same time period that the journeymen in the same craft or trade are employed at the job site. Where an hourly apprenticeship ratio is not feasible for a particular craft or trade, the Division of Apprenticeship Standards, upon application of a joint apprenticeship committee, may order a minimum ratio of not less than one apprentice for each five journeymen in a craft or trade classification.

The contractor or subcontractor, if he or she is covered by this section, upon the issuance of the approval certificate, or if he or she has been previously approved in the craft or trade, shall employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the apprenticeship standards. Upon proper showing by the contractor that he or she employs apprentices in the craft or trade in the state on all of his or her contracts on an annual average of not less than one hour of apprentice work for every five hours of labor performed by a journeyman, or in the land surveyor classification, one apprentice for each five journeymen, the Division of Apprenticeship Standards may grant a certificate exempting the contractor from the 1-to-5 hourly ratio as set forth in this section. This section shall not apply to contracts of

general contractors or to contracts of specialty contractors not bidding for work through a general or prime contractor, when the contracts of general contractors or those specialty contractors involve less than thirty thousand dollars ($30,000) or 20 working days. Any work performed by a journeyman in excess of eight hours per day or 40 hours per week, shall not be used to calculate the hourly ratio required by this section.

"Apprenticeable craft or trade," as used in this section, means a craft or trade determined as an apprenticeable occupation in accordance with rules and regulations prescribed by the Apprenticeship Council. The joint apprenticeship committee shall have the discretion to grant a certificate, which shall be subject to the approval of the Administrator of Apprenticeship, exempting a contractor from the 1-to-5 ratio set forth in this section when it finds that any one of the following conditions is met:

(a) Unemployment for the previous three-month period in the area exceeds an average of 15 percent.

(b) The number of apprentices in training in such area exceeds a ratio of 1 to 5.

(c) There is a showing that the apprenticeable craft or trade is replacing at least one-thirtieth of its journeymen annually through apprenticeship training, either on a statewide basis, or on a local basis.

(d) Assignment of an apprentice to any work performed under a public works contract would create a condition which would jeopardize his or her life or the life, safety, or property of fellow employees or the public at large or if the specific task to which the apprentice is to

be assigned is of such a nature that training cannot be provided by a journeyman.

When exemptions are granted to an organization which represents contractors in a specific trade from the 1-to-5 ratio on a local or statewide basis the member contractors will not be required to submit individual applications for approval to local joint apprenticeship committees, if they are already covered by the local apprenticeship standards.

A contractor to whom the contract is awarded, or any subcontractor under him or her, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade and who is not contributing to a fund or funds to administer and conduct the apprenticeship program in any craft or trade in the area of the site of the public work, to which fund or funds other contractors in the area of the site of the public work are contributing, shall contribute to the fund or funds in each craft or trade in which he or she employs journeymen or apprentices on the public work in the same amount or upon the same basis and in the same manner as the other contractors do, but where the trust fund administrators are unable to accept the funds, contractors not signatory to the trust agreement shall pay a like amount to the California Apprenticeship Council. The contractor or subcontractor may add the amount of the contributions in computing his or her bid for the contract. The Division of Labor Standards Enforcement is authorized to enforce the payment of the contributions to the fund or funds as set forth in Section 227.

The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. The stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.

All decisions of the joint apprenticeship committee under this section are subject to Section 3081.

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§ 29.1 Purpose and scope.

(a) The National Apprenticeship Act of 1937, section 1 (29 U.S.C. 50), authorizes and directs the Secretary of Labor "to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship, and to cooperate with the Office of Education under the Department of Health, Education, and Welfare * * * ." Section 2 of the Act authorizes the Secretary of Labor to "publish information relating to existing and proposed labor standards of apprenticeship," and to "appoint national advisory committees * * * ." (29 U.S.C. 50a).

(b) The purpose of this part is to set forth labor standards to safeguard the welfare of apprentices, and to extend the application of such standards by prescribing policies and procedures concerning the registration, for certain Federal purposes, or acceptable apprenticeship programs with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training. These labor standards, policies and procedures cover the registration, cancellation and deregistration or apprenticeship programs and of apprenticeship agreements; the recognition of a State agency as the appropriate agency for registering local apprenticeship programs for certain Federal purposes; and matters relating thereto.

(c) For further information about this Part 29, contact: Deputy Administrator, Bureau of Apprenticeship and Training, Employment and Training Administration, Room 5000, Patrick Henry Building, Washington, D.C. 20213, Telephone number (202) 376-6585.

§ 29.2 Definitions.

As used in ths [sic] part:

(a) "Department" shall mean the U.S. Department of Labor.

(b) "Secretary" shall mean the Secretary of Labor or any person specifically designated by him.

(c) "Bureau" shall mean the Bureau of Apprenticeship and Training, Employment and Training Administration.

(d) "Administrator" shall mean the Administrator of the Bureau of Apprenticeship and Training, or any person specifically designated by him.

(e) "Apprentice" shall mean a worker at least 16 years of age, except where a higher minimum age standard is otherwise fixed by law, who is employed to learn a skilled trade as defined in § 29.4 under standards of apprenticeship fulfilling the requirements of § 29.5.

(f) "Apprenticeship program" shall mean a plan containing all terms and conditions for the qualification, recruitment, selection, employment and training of apprentices, including such matters as the requirement for a written apprenticeship agreement.

(g) "Sponsor" shall mean any person, association, committee, or organization operating an apprenticeship program and in whose name the program is (or is to be) registered or approved.

(h) "Employer" shall mean any person or organization employing an apprentice whether or not such person or organization is a party to an apprenticeship agreement with the apprentice.

(i) "Apprenticeship committee" shall mean those persons designated by the sponsor to act for it in the administration of the program. A committee may be "joint," i.e., it is composed of an equal number of representatives of the employer(s) and of the employees represented by a bona fide collective bargaining agent(s) and has been established to conduct, operate, or administer an apprenticeship program and enter into apprenticeship agreements with apprentices. A committee may be "unilateral" or "non-joint" and shall mean a program sponsor in which a bona fide collective bargaining agent is not a participant.

(j) "Apprenticeship agreement" shall mean a written agreement between an apprentice and either his employer, or an apprenticeship committee acting as agent for employer(s), which agreement contains the terms and conditions of the employment and training of the apprentice.

(k) "Federal purposes" includes any Federal contract, grant, agreement or arrangement dealing with apprenticeship; and any Federal financial or other assistance, benefit, privilege, contribution, allowance, exemption, preference or right pertaining to apprenticeship.

(l) "Registration of an apprenticeship program" shall mean the acceptance and recording of such program by the Bureau of Apprenticeship and Training, or registration and/or approval by a recognized State Apprenticeship Agency, as meeting the basic standards and requirements of the Department for approval of such program for Federal purposes. Approval is evidenced by a Certificate of Registration or other written indicia.

(m) "Registration of an apprenticeship agreement" shall mean the acceptance and recording thereof by the Bureau or a recognized State Apprenticeship Agency as evidence of the participation of the apprentice in a particular registered apprenticeship program.

(n) "Certification" shall mean written approval by the Bureau of:

(1) A set of apprenticeship standards developed by a national committee or organization, joint or unilateral, for policy or guideline use by local affiliates, as substantially conforming to the standards of apprenticeship set forth in § 29.5; or

(2) An individual as eligible for probationary employment as an apprentice under a registered apprenticeship program.

(o) "Recognized State Apprenticeship Agency" or "recognized State Apprenticeship Council" shall mean an organization approved by the Bureau as an agency or council which has been properly constituted under an acceptable law or Executive order, and has been approved by the Bureau as the appropriate body for State

registration and/or approval of local apprenticeship programs and agreements for Federal purposes.

(p) "State" shall mean any of the 50 States of the United States, the District of Columbia, or any territory or possession of the United States.

(q) "Related instruction" shall mean an organized and systematic form of instruction designed to provide the apprenticeship with knowledge of the theoretical and technical subjects related to his/her trade.

(r) "Cancellation" shall mean the termination of the registration or approval status of a program at the request of the sponsor or termination of an apprenticeship agreement at the request of the apprentice.

(s) "Registration agency" shall mean the Bureau or a recognized State Apprenticeship Agency.

§ 29.3 Eligibility and procedure for Bureau registration of a program.

(a) Eligibility for various Federal purposes is conditioned upon a program's conformity with apprenticeship program standards published by the Secretary of Labor in this part. For a program to be determined by the Secretary of Labor as being in conformity with these published standards the program must be registered with the Bureau or registered with and/or approved by a State Apprenticeship Agency or Council recognized by the Bureau. Such determination by the Secretary is made only by such registration.

(b) No apprenticeship program or agreement shall be eligible for Bureau registration unless (1) it is in conformity with the requirements of this part and the training is in an apprenticeable occupation having the characteristics set forth in § 29.4 herein, and (2) it is in conformity with the requirements of the Department's regulation on "Equal Employment Opportunity in Apprenticeship and Training" set forth in 29 CFR Part 30, as amended.

(c) Except as provided under paragraph (d) of this section, apprentices must be individually registered under a registered program. Such registration may be effected:

(1) By filing copies of each apprenticeship agreement; or

(2) Subject to prior Bureau approval, by filing a master copy of such agreement followed by a listing of the name, and other required data, of each individual when apprenticed.

(d) The names of persons in their first 90 days of probationary employment as an apprentice under an apprenticeship program registered by the Bureau or a recognized State Apprenticeship Agency, if not individually registered under such program, shall be submitted immediately after employment to the Bureau or State Apprenticeship Agency for certification to establish the apprentice as eligible for such probationary employment.

(e) The appropriate registration office must be promptly notified of the cancellation, suspension, or

termination of any apprenticeship agreement, with cause for same, and of apprenticeship completions.

(f) Operating apprenticeship programs when approved by the Bureau shall be accorded registration evidenced by a Certificate of Registration. Programs approved by recognized State Apprenticeship Agencies shall be accorded registration and/or approval evidenced by a similar certificate or other written indicia. When approved by the Bureau, national apprenticeship standards for policy or guideline use shall be accorded certification, evidenced by a certificate attesting to the Bureau's approval.

(g) Any modification(s) or change(s) to registered or certified programs shall be promptly submitted to the registration office and, if approved, shall be recorded and acknowledged as an amendment to such program.

(h) Under a program proposed for registration by an employer or employers' association, where the standards, collective bargaining agreement or other instrument, provides for participation by a union in any manner in the operation of the substantive matters of the apprenticeship program, and such participation is exercised, written acknowledgement of union agreement or "no objection" to the registration is required. Where no such participation is evidenced and practiced, the employer or employers' association shall simultaneously furnish to the union, if any, which is the collective bargaining agent of the employees to be trained, a copy of its application for registration and of the apprenticeship program. The registration agency shall provide a reasonable time period of not less than 30 days nor more than 60

days for receipt of union comments, if any, before final action on the application for registration and/or approval.

(i) Where the employees to be trained have no collective bargaining agent, an apprenticeship program may be proposed for registration by an employer or group of employers.

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[42 FR 10139, Feb. 18, 1977; 42 FR 30836, June 17, 1977, as amended at 49 FR 18295, Apr. 30, 1984]

§ 29.4 Criteria for appreciceable occupations.

An apprenticeable occupation is a skilled trade which possesses all of the following characteristics:

(a) It is customarily learned in a practical way through a structured, systematic program of on-the-job supervised training.

(b) It is clearly identified and commonly recognized throughout an industry.

(c) It involves manual, mechanical or technical skills and knowledge which require a minimum of 2,000 hours of on-the-job work experience.

(d) It requires related instruction to supplement the on-the-job training.

§ 29.5 Standards of apprenticeship.

An apprenticeship program, to be eligible for registration/approval by a registration/approval agency, shall conform to the following standards:

(a) The program is an organized, written plan embodying the terms and conditions of employment, training, and supervision of one or more apprentices in the apprenticeable occupation, as defined in this part, and subscribed to by a sponsor who has undertaken to carry out the apprentice training program.

(b) The program standards contain the equal opportunity pledge prescribed in 29 CFR 30.3(b) and, when applicable, an affirmative action plan in accordance with 29 CFR 30.4, a selection method authorized in 29 CFR 30.5, or similar requirements expressed in a State Plan for Equal Employment Opportunity in Apprenticeship adopted pursuant to 29 CFR Part 30 and approved by the Department, and provisions concerning the following:

(1) The employment and training of the apprentice in a skilled trade;

(2) A term of apprenticeship, not less than 2,000 hours of work experience, consistent with training requirements as established by industry practice;

(3) An outline of the work processes in which the apprentice will receive supervised work experience and training on the job, and the allocation of the approximate time to be spent in each major process;

(4) Provision for organized, related and supplemental instruction in technical subjects related to the trade. A minimum of 144 hours for each year of apprenticeship is

recommended. Such instruction may be given in a classroom through trade or industrial courses, or by correspondence courses of equivalent value, or other forms of self-study approved by the registration/approval agency.

(5) A progressively increasing schedule of wages to be paid the apprentice consistent with the skill acquired. The entry wage shall be not less than the minimum wage prescribed by the Fair Labor Standards Act, where applicable, unless a higher wage is required by other applicable Federal law, State law, respective regulations, or by collective bargaining agreement;

(6) Periodic review and evaluation of the apprentice's progress in job performance and related instruction; and the maintenance of appropriate progress records;

(7) The numeric ratio of apprentices to journeymen consistent with proper supervision, training, safety, and continuity of employment, and applicable provisions in collective bargaining agreements, except where such ratios are expressly prohibited by the collective bargaining agreements. The ratio language shall be specific and clear as to application in terms of jobsite, work force, department or plant;

(8) A probationary period reasonable in relation to the full apprenticeship term, with full credit given for such period toward completion of apprenticeship;

(9) Adequate and safe equipment and facilities for training and supervision, and safety training for apprentices on the job and in related instruction;

(10) The minimum qualifications required by a sponsor for persons entering the apprenticeship program, with an eligible starting age not less than 16 years;

(11) The placement of an apprentice under a written apprenticeship agreement as required by the State apprenticeship law and regulation, or the Bureau where no such State law or regulation exists. The agreement shall directly, or by reference, incorporate the standards of the program as part of the agreement;

(12) The granting of advanced standing or credit for previously acquired experience, training, or skills for all applicants equally, with commensurate wages for any progression step so granted;

(13) Transfer of employer's training obligation when the employer is unable to fulfill his obligation under the apprenticeship agreement to another employer under the same program with consent of the apprentice and apprenticeship committee or program sponsor;

(14) Assurance of qualified training personnel and adequate supervision on the job;

(15) Recognition for successful completion of apprenticeship evidenced by an appropriate certificate;

(16) Identification of the registration agency;

(17) Provision for the registration, cancellation and deregistration of the program; and requirement for the prompt submission of any modification or amendment thereto;

(18) Provision for registration of apprenticeship agreements, modifications, and amendments; notice to

the registration office of persons who have successfully completed apprenticeship programs; and notice of cancellations, suspensions and terminations of apprenticeship agreements and causes therefor;

(19) Authority for the termination of an apprenticeship agreement during the probationary period by either party without stated cause;

(20) A statement that the program will be conducted, operated and administered in conformity with applicable provisions of 29 CFR Part 30, as amended, or a State EEO in apprenticeship plan adopted pursuant to 29 CFR Part 30 and approved by the Department;

(21) Name and address of the appropriate authority under the program to receive, process and make disposition of complaints;

(22) Recording and maintenance of all records concerning apprenticeship as may be required by the Bureau or recognized State Apprenticeship Agency and other applicable law.

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[42 FR 10139, Feb. 18, 1977; 42 FR 30836, June 17, 1977, as amended at 49 FR 18295, Apr. 30, 1984]

§ 29.6 Apprenticeship agreement.

The apprenticeship agreement shall contain explicitly or by reference:

(a) Names and signatures of the contracting parties (apprentice, and the program sponsor or employer), and

the signature of a parent or guardian if the apprentice is a minor.

(b) The date of birth of apprentice.

(c) Name and address of the program sponsor and registration agency.

(d) A statement of the trade or craft in which the apprentice is to be trained, and the beginning date and term (duration) of apprenticeship.

(e) A statement showing (1) the number of hours to be spent by the apprentice in work on the job, and (2) the number of hours to be spent in related and supplemental instruction which is recommended to be not less than 144 hours per year.

(f) A statement setting forth a schedule of the work processes in the trade or industry divisions in which the apprentice is to be trained and the approximate time to be spent at each process.

(g) A statement of the graduated scale of wages to be paid the apprentice and whether or not the required school time shall be compensated.

(h) Statements providing:

(1) For a specific period of probation during which the apprenticeship agreement may be terminated by either party to the agreement upon written notice to the registration agency;

(2) That, after the probationary period, the agreement may be cancelled at the request of the apprentice, or may be suspended, cancelled, or terminated by the sponsor, for good cause, with due notice to the apprentice and

a reasonable opportunity for corrective action, and with written notice to the apprentice and to the registration agency of the final action taken.

(i) A reference incorporating as part of the agreement the standards of the apprenticeship program as it exists on the date of the agreement and as it may be amended during the period of the agreement.

(j) A statement that the apprentice will be accorded equal opportunity in all phases of apprenticeship employment and training, without discrimination because of race, color, religion, national origin, or sex.

(k) Name and address of the appropriate authority, if any, designated under the program to receive, process and make disposition of controversies or differences arising out of the apprenticeship agreement when the controversies or differences cannot be adjusted locally or resolved in accordance with the established trade procedure or applicable collective bargaining provisions.

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[42 FR 10139 Feb. 18, 1977, as amended at 49 FR 18295, Apr. 30, 1984]

§ 29.7 Deregistration of Bureau-registered program.

Deregistration of a program may be effected upon the voluntary action of the sponsor by a request for cancellation of the registration, or upon reasonable cause, by the Bureau instituting formal deregistration proceedings in accordance with the provisions of this part.

(a) *Request by sponsor.* The registration officer may cancel the registration of an apprenticeship program by written acknowledgment of such request stating, but not limited to, the following matters:

(1) The registration is canceled at sponsor's request, and effective date thereof;

(2) That, within 15 days of the date of the acknowledgment, the sponsor shall notify all apprentices of such cancellation and the effective date; that such cancellation automatically deprives the apprentice of his/her individual registration; and that the deregistration of the program removes the apprentice from coverage for Federal purposes which require the Secretary of Labor's approval of an apprenticeship program.

(b) *Formal deregistration* – (1) *Reasonable cause.* Deregistration proceedings may be undertaken when the apprenticeship program is not conducted, operated, and administered in accordance with the registered provisions or the requirements of this part, except that deregistration proceedings for violation of equal opportunity requirements shall be processed in accordance with the provisions under 29 CFR Part 30, as amended;

(2) Where it appears the program is not being operated in accordance with the registered standards or with requirements of this part, the registration officer shall so notify the program sponsor in writing;

(3) The notice shall (i) be sent by registered or certified mail, with return receipt requested; (ii) state the shortcoming(s) and the remedy required; and

(iii) state that a determination of reasonable cause for deregistration will be made unless corrective action is effected within 30 days;

(4) Upon request by the sponsor for good cause, the 30-day term may be extended for another 30 days. During the period for correction, the sponsor shall be assisted in every reasonable way to achieve conformity;

(5) If the required correction is not effected within the allotted time, the registration officer shall send a notice to the sponsor, by registered or certified mail, return receipt requested, stating the following:

(i) The notice is sent pursuant to this subsection;

(ii) Certain deficiencies (stating them) were called to sponsor's attention and remedial measures requested, with dates of such occasions and letters; and that the sponsor has failed or refused to effect correction;

(iii) Based upon the stated deficiencies and failure of remedy, a determination of reasonable cause has been made and the program may be deregistered unless, within 15 days of the receipt of this notice, the sponsor requests a hearing;

(iv) If a request for a hearing is not made, the entire matter will be submitted to the Administrator, BAT, for a decision on the record with respect to deregistration.

(6) If the sponsor has not requested a hearing, the registration officer shall transmit to the Administrator, BAT, a report containing all pertinent facts and circumstances concerning the nonconformity, including the findings and recommendation for deregistration, and copies

of all relevant documents and records. Statements concerning interviews, meetings and conferences shall include the time, date, place, and persons present. The Administrator shall make a final order on the basis of the record before him.

(7) If the sponsor requests a hearing, the registration officer shall transmit to the Secretary, through the Administrator, a report containing all the data listed in paragraph (b)(6) of this section. The Secretary shall convene a hearing in accordance with § 29.9; and shall make a final decision on the basis of the record before him including the proposed findings and recommended decision of the hearing officer.

(8) At his discretion, the Secretary may allow the sponsor a reasonable time to achieve voluntary corrective action. If the Secretary's decision is that the apprenticeship program is not operating in accordance with the registered provisions or requirements of this part, the apprenticeship program shall be deregistered. In each case in which reregistration is ordered, the Secretary shall make public notice of the order and shall notify the sponsor.

(9) Every order of deregistration shall contain a provision that the sponsor shall, within 15 days of the effective date of the order, notify all registered apprentices of the deregistration of the program; the effective date thereof; that such cancellation automatically deprives the apprentice or his/her individual registration; and that the deregistration removes the apprentice from coverage for Federal purposes which require the Secretary of Labor's approval of an apprenticeship program.

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[42 FR 10319, Feb. 18, 1977, as amended at 49 FR 18295, Apr. 30, 1984]

§ 29.8 Reinstatement of program registration.

Any apprenticeship program deregistered pursuant to this part may be reinstated upon presentation of adequate evidence that the apprenticeship program is operating in accordance with this part. Such evidence shall be presented to the Administrator, BAT, if the sponsor had not requested a hearing, or to the Secretary, if an order of deregistration was entered pursuant to a hearing.

§ 29.9 Hearings.

(a) Within 10 days of his receipt of a request for a hearing, the Secretary shall designate a hearing officer. The hearing officer shall give reasonable notice of such hearing by registered mail, return receipt requested, to the appropriate sponsor. Such notice shall include (1) a reasonable time and place of hearing, (2) a statement of the provisions of this part pursuant to which the hearing is to be held, and (3) a concise statement of the matters pursuant to which the action forming the basis of the hearing is proposed to be taken.

(b) The hearing officer shall regulate the course of the hearing. Hearings shall be informally conducted. Every party shall have the right to counsel, and a fair opportunity to present his/her case, including such cross-examination as may be appropriate in the circumstances.

Hearings officers shall make their proposed findings and recommended decisions to the Secretary upon the basis of the record before them.

§ 29.10 Limitations.

Nothing in this part or in any apprenticeship agreement shall operate to invalidate.

(a) Any apprenticeship provision in any collective bargaining agreement between employers and employees establishing higher apprenticeship standards; or

(b) Any special provision for veterans, minority persons or females in the standards, apprentice qualifications or operation of the program, or in the apprenticeship agreement, which is not otherwise prohibited by law, Executive order, or authorized regulation.

§ 29.11 Complaints.

(a) This section is not applicable to any complaint concerning discrimination or other equal opportunity matters; all such complaints shall be submitted, processed and resolved in accordance with applicable provisions in 29 CFR Part 30, as amended, or applicable provisions of a State Plan for Equal Employment Opportunity in Apprenticeship adopted pursuant to 29 CFR Part 30 and approved by the Department.

(b) Except for matters described in paragraph (a) of this section, any controversy or difference arising under an apprenticeship agreement which cannot be adjusted locally and which is not covered by a collective bargaining agreement, may be submitted by an apprentice, or

his/her authorized representative, to the appropriate registration authority, either Federal or State, which has registered and/or approved the program in which the apprentice is enrolled, for review. Matters covered by a collective bargaining agreement are not subject to such review.

(c) The complaint, in writing and signed by the complainant, or authorized representative, shall be submitted within 60 days of the final local decision. It shall set forth the specific matter(s) complained of, together with all relevant facts and circumstances. Copies of all pertinent documents and correspondence shall accompany the complaint.

(d) The Bureau or recognized State Apprenticeship Agency, as appropriate, shall render an opinion within 90 days after receipt of the complaint, based upon such investigation of the matters submitted as may be found necessary, and the record before it. During the 90-day period, the Bureau or State agency shall make reasonable efforts to effect a satisfactory resolution between the parties involved. If so resolved, the parties shall be notified that the case is closed. Where an opinion is rendered, copies of same shall be sent to all interested parties.

(e) Nothing in this section shall be construed to require an apprentice to use the review procedure set forth in this section.

(f) A State Apprenticeship Agency may adopt a complaint review procedure differing in detail from that given in this section provided it is proposed and has been approved in the recognition of the State Apprenticeship Agency accorded by the Bureau.

§ 29.12 Recognition of State agencies.

(a) The Secretary's recognition of a State Apprenticeship Agency or Council (SAC) gives the SAC the authority to determine whether an apprenticeship program conforms with the Secretary's published standards and the program is, therefore, eligible for those Federal purposes which require such a determination by the Secretary. Such recognition of a SAC shall be accorded by the Secretary upon submission and approval of the following:

(1) An acceptable State apprenticeship law (or Executive order), and regulations adopted pursuant thereto;

(2) Acceptable composition of the State Apprenticeship Council (SAC);

(3) An acceptable State Plan for Equal Employment Opportunity in Apprenticeship;

(4) A description of the basic standards, criteria, and requirements for program registration and/or approval; and

(5) A description of policies and operating procedures which depart from or impose requirements in addition to those prescribed in this part.

(b) *Basic requirements.* Generally the basic requirements under the matters covered in paragraph (a) of this section shall be in conformity with applicable requirements as set forth in this part. Acceptable State provisions shall:

(1) Establish the apprenticeship agency in (i) the State Department of Labor, or (ii) in that agency of State government having jurisdiction of laws and regulations

governing wages, hours, and working conditions, or (iii) that State agency presently recognized by the Bureau, with a State official empowered to direct the apprenticeship operation;

(2) Require that the State Apprenticeship Council be composed of persons familiar with apprenticeable occupations and an equal number of representatives of employer and of employee organizations and may include public members who shall not number in excess of the number named to represent either employer or employee organizations. Each representative so named shall have one vote. Ex officio members may be added to the council but they shall have no vote except where such members have a vote according to the established practice of a presently recognized council. If the State official who directs the apprenticeship operation is a member of the council, provision may be made for the official to have a tie-breaking vote;

(3) Clearly delineate the respective powers and duties of the State official and of the council;

(4) Clearly designate the officer or body authorized to register and deregister apprenticeship programs and agreements;

(5) Establish policies and procedures to promote equality of opportunity in apprenticeship programs pursuant to a State Plan for Equal Employment Opportunity in Apprenticeship which adopts and implements the requirements of 29 CFR Part 30, as amended, and to require apprenticeship programs to operate in conformity with such State Plan and 29 CFR Part 30, as amended;

(6) Prescribe the contents of apprenticeship agreements;

(7) Limit the registration of apprenticeship programs to those providing training in "apprenticeable" occupations as defined in § 29.4;

(8) Provide that apprenticeship programs and standards of employers and unions in other than the building and construction industry, which jointly form a sponsoring entity on a multistate basis and are registered pursuant to all requirements of this part by any recognized State Apprenticeship Agency/Council or by the Bureau, shall be accorded registration or approval reciprocity by any other State Apprenticeship Agency/Council or office of the Bureau if such reciprocity is requested by the sponsoring entity;

(9) Provide for the cancellation, deregistration and/or termination of approval of programs, and for temporary suspension, cancellation, deregistration and/or termination of approval of apprenticeship agreements; and

(10) Provide that under a program proposed for registration by an employer or employers' association, and where the standards, collective bargaining agreement or other instrument provides for participation by a union in any manner in the operation of the substantive matters of the apprenticeship program, and such participation is exercised, written acknowledgment of union agreement or "no objection" to the registration is required. Where no such participation is evidenced and practiced, the employer or employers' association shall simultaneously furnish to the union, if any, which is the collective bargaining agent of the employees to be trained, a copy of its

application for registration and of the apprenticeship program. The State agency shall provide a reasonable time period of not less than 30 days nor more than 60 days for receipt of union comments, if any, before final action on the application for registration and/or approval.

(c) *Application for recognition.* A State Apprenticeship Agency/Council desiring recognition shall submit to the Administrator, BAT, the documentation specified in § 29.12(a) of this part. A currently recognized Agency/Council desiring continued recognition by the Bureau shall submit to the Administrator the documentation specified in § 29.12(a) of this part on or before July 18, 1977. An extension of time within which to comply with the requirements of this part may be granted by the Administrator for good cause upon written request by the State agency but the Administrator shall not extend the time for submission of the documentation required by § 29.12(a). The recognition of currently recognized Agencies/Councils shall continue until July 18, 1977 and during any extension period granted by the Administrator.

(d) *Appeal from denial of recognition.* The denial by the Administrator of a State agency's application for recognition under this part shall be in writing and shall set forth the reasons for the denial. The notice of denial shall be sent to the applicant by certified mail, return receipt requested. The applicant may appeal such a denial to the Secretary by mailing or otherwise furnishing to the Administrator, within 30 days of receipt of the denial, a notice of appeal addressed to the Secretary and setting forth the following items:

(1) A statement that the applicant appeals to the Secretary to reverse the Administrator's decision to deny its application;

(2) The date of the Administrator's decision and the date the applicant received the decision;

(3) A summary of the reasons why the applicant believes that the Administrator's decision was incorrect;

(4) A copy of the application for recognition and subsequent modifications, if any;

(5) A copy of the Administrator's decision of denial. Within 10 days of receipt of a notice of appeal, the Secretary shall assign an Administrative Law Judge to conduct hearings and to recommend findings of fact and conclusions of law. The proceedings shall be informal, witnesses shall be sworn, and the parties shall have the right to counsel and of cross-examination.

The Administrative Law Judge shall submit the recommendations and conclusions, together with the entire record to the Secretary for final decision. The Secretary shall make his final decision in writing within 30 days of the Administrative Law Judge's submission. The Secretary may make a decision granting recognition conditional upon the performance of one or more actions by the applicant. In the event of such a conditional decision, recognition shall not be effective until the applicant has submitted to the Secretary evidence that the required actions have been performed and the Secretary has communicated to the applicant in writing that he is satisfied with the evidence submitted.

(e) *State apprenticeship programs.*

(1) An apprenticeship program submitted for registration with a State Apprenticeship Agency recognized by the Bureau shall, for Federal purposes, be in conformity with the State apprenticeship law, regulations, and with the State Plan for Equal Employment Opportunity in Apprenticeship as submitted to and approved by the Bureau pursuant to 29 CFR 30.15, as amended;

(2) In the event that a State Apprenticeship Agency is not recognized by the Bureau for Federal purposes, or that such recognition has been withdrawn, or if no State Apprenticeship Agency exists, registration with the Bureau may be requested. Such registration shall be granted if the program is conducted, administered and operated in accordance with the requirements of this part and the equal opportunity regulation in 29 CFR Part 30, as amended.

(Approved by the Office of Management and Budget under OMB control no. 1205-0223)

[42 FR 10318, Feb. 18, 1977, as amended at 49 FR 18295, Apr. 30, 1984]

§ 29.13 Derecognition of State agencies.

The recognition for Federal purposes of a State Apprenticeship Agency or State Apprenticeship Council (hereinafter designated "respondent"), may be withdrawn for the failure to fulfill, or operate in conformity with, the requirements of this part. Derecognition proceedings for reasonable cause shall be instituted in accordance with the following:

(a) Derecognition proceedings for failure to adopt or properly enforce a State Plan for Equal Employment Opportunity in Apprenticeship shall be processed in accordance with the procedures prescribed in 29 CFR 30.15.

(b) For causes other than those under paragraph (a) above, the Bureau shall notify the respondent and appropriate State sponsors in writing, by certified mail, with return receipt requested. The notice shall set forth the following:

(1) That reasonable cause exists to believe that the respondent has failed to fulfill or operate in conformity with the requirements of this part;

(2) The specific areas of nonconformity;

(3) The needed remedial measures; and

(4) That the Bureau proposes to withdraw recognition for Federal purposes unless corrective action is taken, or a hearing request mailed, within 30 days of the receipt of the notice.

(c) If, within the 30-day period, respondent:

(1) Complies with the requirements, the Bureau shall so notify the respondent and State sponsors, and the case shall be closed;

(2) Fails to comply or to request a hearing, the Bureau shall decide whether recognition should be withdrawn. If the decision is in the affirmative, the Administrator shall forward all pertinent data to the Secretary,

together with the findings and recommendation. The Secretary shall make the final decision, based upon the record before him.

(3) Requests a hearing, the Administrator shall forward the request to the Secretary, and the procedures under § 29.9 shall be followed, with notice thereof to the State apprenticeship sponsors.

(d) If the Secretary determines to withdraw recognition for Federal purposes, he shall notify the respondent and the State sponsors of such withdrawal and effect public notice of such withdrawal. The notice to the sponsors shall state that, 30 days after the date of the Secretary's order withdrawing recognition of the State agency, the Department shall cease to recognize, for Federal purposes, each apprenticeship program registered with the State agency unless, within that time, the State sponsor requests registration with the Bureau. The Bureau may grant the request for registration contingent upon its finding that the State apprenticeship program is operating in accordance with the requirements of this part and of 29 CFR Part 30, as amended. The Bureau shall make a finding on this issue within 30 days of receipt of the request. If the finding is in the negative, the State sponsor shall be notified in writing that the contingent Bureau registration has been revoked. If the finding is in the affirmative, the State sponsor shall be notified in writing that the contingent Bureau registration is made permanent.

(e) If the sponsor fails to request Bureau registration, or upon a finding of noncompliance pursuant to a contingent Bureau registration, the written notice to such

State sponsor shall further advise the recipient that any actions or benefits applicable to recognition "for Federal purposes" are no longer available to participants in its apprenticeship program.

(f) Such notice shall also direct the State sponsor to notify, within 15 days, all its registered apprentices of the withdrawal of recognition for Federal purposes; the effective date thereof; and that such withdrawal removes the apprentice from coverage under any Federal provision applicable to his/her individual registration under a program recognized or registered by the Secretary of Labor for Federal purposes.

(g) A State Apprenticeship Agency or Council whose recognition has been withdrawn pursuant to this part may have its recognition reinstated upon presentation of adequate evidence that it has fulfilled, and is operating in accordance with, the requirements of this part.

(Approved by the Office of Management and Budget under OMB control no. 1205-0223)

[42 FR 10139, Feb. 18, 1977, as amended at 49 FR 18295, Apr. 30, 1984]

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38 Fed. Reg. 13894 (1973) (to be codified at 29 C.F.R. pt. 29) (proposed May 25, 1973)

DEPARTMENT OF LABOR

Office of the Secretary

[29 CFR Part 29]

LABOR STANDARDS FOR THE REGISTRATION OF APPRENTICESHIP PROGRAMS

Notice of Proposed Rulemaking

Pursuant to section 1 of the National Apprenticeship Act of 1937 (29 U.S.C. 50), Reorganization Plan No. 14 of 1950 (64 Stat. 1267; 3 CRF 1949-53 Comp., p. 1007), the Copeland Act (40 U.S.C. 276c), and 5 U.S.C. 301, it is proposed to amend 29 CFR subtitle A by adding thereto a new part 29 to read as set forth below. If this proposed new part 29 is adopted, conforming changes will be made at a later date in part 30 of the title.

This new part sets out labor standards, policies, and procedures relating to the registration, cancellation, and deregistration of apprenticeship programs and of apprenticeship agreements by the Bureau of Apprenticeship and Training, the recognition of a State agency as the appropriate agency for registering local apprenticeship programs for certain Federal purposes, and the standards for Bureau approval of on-the-job training programs.

Interested persons may submit written data, views, and arguments concerning this proposal to the Secretary of Labor, U.S. Department of Labor, Washington, D.C. 20210, on or before June 25, 1973.

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40 Fed. Reg. 11340 (1975) (to be codified at 29 C.F.R. pt. 29) (proposed Mar. 10, 1975)

DEPARTMENT OF LABOR

Office of the Secretary

[29 CFR Part 29]

APPRENTICESHIP PROGRAMS

Proposed Registration Standards

Pursuant to section 1 of the National Apprenticeship Act of 1937 (29 U.S.C. 50), Reorganization Plan No. 14 of 1950 (64 Stat. 1267; 3 CFR 1949-53 Comp., p. 1007), the Copeland Act (40 U.S.C. 276c), and 5 U.S.C. 301, the Department of Labor proposed to amend 29 CFR subtitle A by adding thereto a new Part 29, which was published at 38 FR 13894.

This proposed new part set out labor standards, policies and procedures relating to the registration cancellation and deregistration of apprenticeship programs and of apprenticeship agreements by the Bureau of Apprenticeship and Training, the recognition of a State agency as the appropriate agency for registering local apprenticeship programs for certain Federal purposes, and the standards for Bureau approval of on-the-job training programs.

The Department invited interested persons to submit written views and comments concerning the proposal and numerous comments were received. The Department studied these comments carefully with a resulting decision to revise the proposed regulations in certain respects. The intended revisions were presented to the

Federal Committee on Apprenticeship and the Committee after consideration, has recommended their adoption.

The revisions with a short explanatory statement are as follows:

In § 29.1(b) delete the last sentence, which reads: "Standards for Bureau approval of on-the-job training programs are also set forth." This and all other references to "on-the-job training" and to "trainees" at various places throughout the proposal, including § 29.15 in its entirety, are deleted. These revisions are consistent with the principle of confining the proposed apprenticeship regulations in this part to matters of apprenticeship only.

In § 29.4 delete paragraphs (c), (f), (g), and the second sentence of (e); modify paragraph (d) so that the minimum term of apprenticeship is 2,000 hours of work experience and additional hours of related instruction. These revisions are intended to make less restrictive the criteria for appenticeable occupations and to encourage the expansion of the apprenticeship system into occupational fields where it has not traditionally been used.

In § 29.5(b) paragraph (2) has been modified to conform to § 29.4(d).

In § 29.5(b) delete paragraph (20) as being impractical as a universal requirement, and unnecessary in view of the protections afforded in § 29.6(h) (1) and (2).

In § 29.6 delete paragraph (k), which pertains to the transfer of apprenticeship agreements in certain cases, as being impractical and imposing an unnecessary burden upon the employer in view of § 29.5(b)(13).

Section 29.12 is rewritten to provide in paragraph (b)(1) for continued recognition of State apprenticeship agencies presently recognized, and in paragraph (b)(2) to provide for public members on State apprenticeship councils and to accommodate existing voting practices by such councils. The present § 29.12(c) is redesignated as (d); a new paragraph (c) is inserted; it provides for the right of appeal and procedures related thereto in case of the denial of the application by a State agency for recognition.

Section 29.14 is deleted in entirety as unnecessary for administrative purposes.

Other minor revisions are made for clarity.

Interested persons may submit written views and arguments concerning this revised proposal to the Secretary of Labor, U.S. Department of Labor, Washington, D.C. 20210, on or before April 9, 1975.

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42 Fed. Reg. 10138-10139 (1977) (to be codified at 29 C.F.R. pt. 29)

Title 29 – Labor

SUBTITLE A – OFFICE OF THE SECRETARY OF LABOR

PART 29 – LABOR STANDARDS FOR THE REGISTRATION OF APPRENTICESHIP PROGRAMS

Policies and Procedures

On Tuesday, October 19, 1976, the Department of Labor published in the FEDERAL REGISTER (41 FR 46148) proposed registration standards for apprenticeship programs. These standards, in the form of the addition of a new Part 29 to 29 CFR subtitle A, were promulgated pursuant to the authority of section 1 of the National Apprenticeship Act of 1937 (29 U.S.C. 50) Reorganization Plan No. 14 of 1950 (64 Stat. 1267; 3 CFR 1949-53 Comp., p. 1007), the Copeland Act (40 U.S.C. 276c), and 5 U.S.C. 301.

A revised version of the proposed standards was issued in 1975 and published at 40 FR 11340 (3-10-75). Comments to this initial proposed rulemaking were considered at length by the Federal Committee on Apprenticeship and by the Department of Labor. This process resulted in the insurance of the proposed rulemaking on October 19, 1976. The Department invited interested persons to submit written views and comments before November 22, 1976, concerning the proposal, and numerous responses were received. The Department has studied these comments carefully and several editorial and clarifying changes have been incorporated into the regulation. However, Part 29, which is published as final today is basically the same as the proposal of October 19.

This document was prepared under the direction of Hugh C. Murphy, Administrator, Bureau of Apprenticeship and Training. For Further information about this document, contact:

James P. Mitchell, Deputy Administrator, Bureau of Apprenticeship and Training, Employment and Training Administration, Room 5000, Patrick Henry Building, Washington, D.C. 20213. Telephone No. 202-376-6585.

This new part sets out labor standards, policies and procedures relating to the registration, cancellation and deregistration of apprenticeship programs and of apprenticeship agreements by the Bureau of Apprenticeship and Training (BAT), the recognition of a State Apprenticeship Council or Agency (SAC) as the appropriate agency for registering local apprenticeship programs for certain Federal purposes, and the derecognition of a SAC.

Those provisions which caused significant comment are as follows:

1. In § 29.2, Definitions, the definition of "Federal purposes" in paragraph (k) was unclear to several persons. The definition in this section is very broad, However, those Federal purposes which this part affects are described in § 29.3(a), which reads as follows: "Eligibility for various Federal purposes is conditioned upon a program's conformity with apprenticeship program standards published by the Secretary of Labor in this part. For a program to be determined by the Secretary of Labor as being in conformity with these published standards the program must be registered with the Bureau or registered with and/or approved by a State Apprenticeship

Agency or Council recognized by the Bureau. Such determination by the Secretary is made only by such registration." Examples of such Federal purposes are the Davis-Bacon Act and the Service Contract Act.

2. In § 29.3, Eligibility and procedure for Bureau registration of a program, some persons read paragraph (h) as being applicable to "unilateral" programs (i.e., to programs sponsored by employers not having a collective bargaining agreement with a union). The text makes it quite clear that paragraph (h) applies only to those potential sponsors who are parties to an existing collective bargaining agreement and then only in very limited circumstances. Paragraph (1) underscores this point; it states that where an employer or group of employers wishes to register an apprenticeship program and there is no existing collective bargaining agreement, the employer or group of employers are not required to deal with a union.

3. In § 29.4. Criteria for apprenticeable occupation, paragraph (c) states that an apprenticeable occupation "involves manual, mechanical or technical skills and knowledge which require a minimum of 2,000 hours of on-the-job work experience." Several persons had the impression that the Bureau of Apprenticeship and Training would allow almost any presently-recognized apprenticeable occupation to be registered as long as it met a minimum standard of 2,000 hours of on-the-job experience. This is not the intent of the Bureau of Apprenticeship and Training, nor does the paragraph when read in connection with the rest of this part – particularly § 29.5.

Standards of apprenticeship – allow such an interpretation. Although the Bureau of Apprenticeship and Training has recognized only a handful of occupations having a minimum requirement of 2,000 hours of on-the-job experience, as well as related instruction to supplement this work experience, the Department believes other such occupations may exist. By setting 2,000 hours of on-the-job work experience as the minimum criterion, the Department feels it will be better able to fulfill its responsibility under the Fitzgerald Act to promote apprenticeship.

4. In § 29.5, Standards of apprenticeship, a number of changes have been made.

Paragraph (b)(4) has been changed to emphasize that plans of self-study will not be automatically approved. Rather, each such proposed plan will be considered on its merits by the Bureau of Apprenticeship and Training, as will [sic] as all other forms of related training, before approval is given to a program.

Paragraph (b)(7) has been amended to include safety as one of the factors to be weighed by the Bureau of Apprenticeship and Training when it considers the proposed ratio of apprentices to journeymen.

Paragraph (b)(10) has been revised as follows (omitted words are in brackets; added words are italicized): "The [required] minimum qualifications *required by a sponsor* for persons entering [an] *the* apprenticeship program, with an eligible starting age not less than 16 years;"

Paragraph (b)(14) has been revised by adding the words in italics: "Assurance of qualified training personnel *and adequate supervision on the job.*"

5. In § 29.12(a). Recognition of State agencies, the language of paragraph (a) has been revised to clarify the legal effect of the Secretary's recognition of a State Apprenticeship Council. Paragraph (a) now reads: "(a) The Secretary's recognition of a State Apprenticeship Agency or Council (SAC) gives the SAC the authority to determine whether an apprenticeship program conforms with the Secretary's published standards and the program is, therefore, eligible for those Federal purposes which require such a determination by the Secretary. Such recognition of a SAC shall be accorded by the Secretary upon submission and approval of the following:"

6. In § 29.12, several commenters objected to the language of paragraph (b) (8). This paragraph requires the SAC to "provide that apprenticeship programs and standards of employers and unions in other than the building and construction industry, which jointly form a sponsoring entity on a multistate basis and are registered pursuant to all requirements of this part by any recognized State Apprenticeship Agency/Council or by the Bureau, shall be accorded registration or approval reciprocity by any other State Apprenticeship Agency/Council or office of the Bureau if such reciprocity is requested by the sponsoring entity."

This provision was approved without dissent by the Federal Committee on Apprenticeship on September 8, 1976. It was the intent of the Committee to simplify the problems experienced by a relatively few number of

apprenticeship programs. None of these programs are in the construction occupations. Rather the paragraph applies to those programs which are operated by large, industrial companies such as General Motors. Ford, Alco, etc. in conjunction with the locals of several large international unions.

The national standards for these programs are developed by the national office of the joint apprenticeship committee of the industry, in conjunction with the national staff of the Bureau of Apprenticeship and Training. The Department of Labor approves and publishes these standards. The local joint apprenticeship committee ordinarily adopts the approved national pattern standards without change, except for such local matters as those involving wage rates and affirmative action goals. The local programs, which are administered jointly by the employer and the union, are situated in large plants with a relatively stable work force employed on a year-round basis. Hence, these programs differ from the typical construction employer who operates on a multistate basis.

The construction industry employs a mobile work force primarily in seasonal jobs. In construction programs, because of the seasonality of construction work, the apprentice's on-the-job training will usually be interrupted several times during the course of his/her apprenticeship and the supervision will be provided by several employers. In multistate operations, it may be necessary to provide related instruction at several places.

In the non-construction programs which this paragraph will affect, the typical apprentice will be employed year-round at the same site by the same employer during

the entire term of his/her apprenticeship, and will receive on-the-job training and supervision from the same employer. Although related training may not be conducted at the worksite, it will ordinarily be conducted at the same location throughout the entire term of the individual's apprenticeship.

The Department believes it is reasonable to make a distinction between apprenticeship programs in the construction industry and those in other industries because of the differences mentioned above. These differences have an effect on what factors are necessary to insure a proper apprenticeship program in a particular craft.

The Department believes it is reasonable to draw a distinction between those multistate non-construction employers who conduct an apprenticeship program jointly with a union and those who conduct a unilateral apprenticeship program. The local programs, in practice, adopt the occupation's national pattern standards which have been developed by the occupation's national joint apprenticeship committee in cooperation with the national office of BAT and published by the Department.

The program is administered not by the employer alone but by the local joint apprenticeship committee (JAC) composed of both employer and union representatives. These two elements have both mutual and conflicting interest in assuring that the apprenticeship program is properly operated. The result of this tension of interests is more likely to result in a proper training program than would be the case in a program operated unilaterally.

Because of the stable year-round work force at the worksite, the journeymen are able to reach an informed opinion on the quality of the apprenticeship program. Each of the journeymen pays a percentage of his/her wage for the operation of the program. These circumstances increase the likelihood that complaints about deficiencies in the program. If not corrected by the JAC, will reach the registration agency which can take corrective action.

7. In § 29.12(c), language has been added to make clear that currently-recognized State Apprenticeship Agencies and State Apprenticeship Councils retain their recognition during the 120-day period after the effective date of this part, as well as during any extension period granted by the Administrator.

8. Several persons believed that the requirements contained throughout § 29.12 represent an unwarranted intrusion of Federal control into the operations of the SACs. The Department believes that this conclusion is not correct.

As far as the Department knows, the recognized SACs are already in substantial conformity with the minimum standards set forth in this section, with the exception of paragraphs (b)(8) and (b)(10), which have been addressed earlier. Where they are not, paragraph (c) affords the State a 120-day period within which to conform. An extension of time may be granted by the Administrator of the Bureau for good cause.

It does not seem to the Department that it will be an undue hardship for the SACs to conform to the minimal requirements set forth in this part or to provide to the

Department the information required by § 29.12(a), since recognition by the Secretary has important economic effects (as in the operation of the Davis-Bacon Act and the Service Contract Act) and important effects in promoting and improving the apprenticeship system. For these reasons it seems reasonable to the Department that the Secretary have documentary evidence that a recognized State agency is conforming to the minimum standard set forth in this part.

Some persons have read § 29.12(a)(5) in a manner which does not appear justified by the text. It requires a SAC to submit to the Bureau "a description of policies and operating procedures which depart from or impose requirements in addition to those prescribed in this part." While the Bureau has the right to approve or disapprove such variations, the purpose of this provision is not to enable the Bureau to control SACs or to dictate policies and procedures. Rather, it allows the Secretary to be informed of the policies and procedures of the SACs to which the Secretary has accorded recognition. The Department can then make its own judgment on whether these policies and procedures conflict with the requirements of this part.

9. Finally, some persons expressed reservations about the hearing procedures that are outlined in these regulations, primarily in § 29.9. Specifically, hearings are called for in the following circumstances:

(a) The deregistration of Bureau-registered program (§ 29.7);

(b) Denials of a State agency's application for Bureau recognition (§ 29.12); and

(c) Withdrawal of Bureau recognition of a State Apprenticeship Agency or Council (§ 29.13). These hearings are available to the aggrieved parties specified in the respective sections, when such aggrieved parties have taken the steps required to trigger their hearing rights.

The Department has adopted the hearing procedures used in this part for a number of reasons. First: The hearing provisions are sound from a standpoint of due process and conform to well-settled principles of administrative law. Section 29.9 allows for the appointment of an administrative law judge. Moreover, the hearing provides a forum where both sides, in an adversary setting, may present and defend evidence.

Second: The hearing provisions in this part are virtually identical to those of 29 CFR Part 30, relating to Equal Opportunity in Apprenticeship. The Department is not aware of any serious complaints about this procedure. It is anticipated that hearings under Part 29 will be infrequent. Under these circumstances, it does not seem feasible to establish a separate appeals mechanism.

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HOUSE COMM. ON LABOR,
SAFEGUARD THE WELFARE OF APPRENTICES, H.R. Rep. No. 945, 75th Cong., 1st Sess. 2-3 (1937)

PURPOSE OF THE BILL

Before 1934 there had been no national approach toward having labor standings of apprenticeship accepted. The Federal Committee on Apprentice Training has established a workable approach, has brought together national trade associations and labor organizations to formulate apprenticeship programs acceptable to both groups, has cooperated with State and local groups interested in apprenticeship, and has served in an advisory capacity to both employers and employees in setting up practical programs for training skilled workers. The bill (H. R. 6205) permits the continuance of the work which is now being done by the Federal Committee on Apprentice Training and which has proved of great value to industry, labor, and young people. The Federal Committee on Apprentice Training was appointed by the Secretary of Labor in June 1934 under authority granted by Executive Order No. 6750-C, to provide for genuine apprentice training under the National Recovery Administration codes and at the same time safeguard labor standards. So effective was the work of the Federal Committee under the National Recovery Administration that it was decided to continue it after the National Recovery Act was declared unconstitutional. Its administration was placed under the jurisdiction of the National Youth Administration. In September 1936 the President, in a letter to the Secretary of Labor, requested the transfer of the Federal Committee on Apprentice Training to the Department of Labor and directed that an appropriation

to cover this activity be included in the Department's budget. Such action was approved by the National Youth Administration and by the Federal Committee on Apprentice Training. It was recognized that the work should be placed on a permanent basis.

Accordingly, the Department of Labor included an item for the work of the Federal Committee in its appropriation request for 1937-38 and the Budget Bureau recommended to the Congress an appropriation for this work during the coming fiscal year. However, the Committee on Appropriations of the House of Representatives was of the opinion that it could not approve this item as a matter of policy and that the assignment of functions should have special consideration by Congress. In accordance with this decision, H. R. 6205 was introduced by Mr. Fitzgerald of Connecticut and referred to the Committee on Labor.

The committee is of the opinion that the development of an adequate apprenticeship system is not an emergency program. There is constant need for some Federal agency to bring employers and employees together in the formulation of national programs of apprenticeship and to attempt to adjust the supply of skilled workers to the demands of industry. This is a logical function of the United States Department of Labor.

The forces which give rise to the prediction of a shortage of skilled workers in some trades were not set in motion by the depression alone. Because of the inadequacy of American apprenticeship, a large part of the supply of skilled labor came from abroad. The setting up of immigration bars dried up this source of supply. The

effect of the immigration laws on the supply of skilled labor, however, was discounted because of the fact that it was erroneously believed the automatic machine was rapidly making the all-around skilled workman unnecessary; and because it was expected that technical schools could provide all the training required for skilled work. Another cause was the failure to emphasize the attractiveness to youth of work in the trades. The depression, it is true, has aggravated the situation by terminating such apprenticeship programs as were being conducted. During the last 5 years there has also been a natural shrinkage in the ranks of skilled workers. The records of the United States Employment Service show that a skilled labor shortage is evidenced when a trade reaches 75 to 80 percent of normal. So, with increasing business activity, this problem of shortage of craftsmen will become more acute.

The important bearing that the training of skilled workers has upon our social structure, especially with respect to relief, security, citizenship, crime, and national defense, was clearly indicated to the committee. Because of the nature of the problem, it is of vital importance that the Congress take cognizance of it and take action to strengthen the remedial measures which have been inaugurated by the Federal Committee on Apprentice Training.

Both employers and labor heartily approved the work which is being done by the Federal Committee on Apprentice Training and recommended that it be continued under the Department of Labor. The agency dealing with labor standards in apprenticeship must have the confidence of labor and of employers, for their whole-

hearted support and cooperation must be secured before constructive action can be started. The employer supplies the job and the facilities for training. The workers have the skill and do the actual imparting of skills to the apprentices. There is a mutual interest between the employer and the workers in proper standards for apprenticeship. Distrust and suspicion often develop when either one or the other undertakes the training program alone. It was pointed out to the committee by employers and employees that industry and labor are being brought together by the Federal Committee on Apprentice Training in a most effective manner to work out and administer apprentice programs and that young people are being assisted thereby to secure training which fits them for profitable employment and responsible citizenship. The experience of this close cooperation between management and labor on questions of apprenticeship may be expected to influence beneficially other negotiations between management and labor, with the consequent benefits to the whole Nation.

Both the employer and employee representatives before the committee expressed themselves to the effect that the appropriation which had been requested for this work was inadequate. There was unanimous agreement, however, that the bill should be passed. The National Youth Administration and the United States Office of Education also endorsed the measure.

No opposition was registered with the committee.

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81 Cong. Rec. 6631-6633

APPRENTICES IN INDUSTRY

Mrs. NORTON. Mr. Speaker, by direction of the Committee on Labor I call up the bill (H. R. 7274) to enable the Department of Labor to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices and to cooperate with the States in the promotion of such standards, and ask for its immediate consideration.

Mr. THOMPSON of Illinois. Mr. Speaker, I make the point of order a quorum is not present.

Mr. RANKIN. We will pass this bill tonight unless the House adjourns on a roll call, if we have to stay here until midnight.

Mr. THOMPSON of Illinois. Mr. Speaker, I withdraw my point of order for the moment.

Mr. MARTIN of Massachusetts. I renew the point of order Mr. Speaker.

The SPEAKER. The gentleman from Massachusetts makes the point of order a quorum is not present.

Mr. MARTIN of Massachusetts. Mr. Speaker, I think the minority members of the Committee on Labor are not aware this bill is coming up. I think they should be here and have a chance to be heard if we are going on with it.

Mrs. NORTON. Mr. Speaker, will the gentleman withhold his point of order?

Mr. MARTIN of Massachusetts. Yes; I withhold my point of order for the moment, Mr. Speaker.

Mr. COX. May I appeal to the gentleman from Mississippi that he kindly not object to the unanimous-consent request of the gentleman from Texas?

Mr. RANKIN. If the gentleman will let the call of committees proceed, when it gets down to the Committee on World War Veterans' Legislation I am willing to let him dispense with further proceedings under the call of committees, but I am not going to withdraw my objection until the World War Veterans' Committee is called.

Mr. COX. The gentleman has that right, of course.

The SPEAKER. Does the gentleman from Massachusetts withhold his point of order?

Mr. MARTIN of Massachusetts. I must insist on my point of order, Mr. Speaker.

The SPEAKER. The gentleman declines to withhold his point of order. A constitutional question has been raised that a quorum is not present. The Chair will count.

Mr. MARTIN of Massachusetts. Mr. Speaker, I withdraw the point of order for a moment.

The SPEAKER. The gentleman from Massachusetts withdraws his point of order.

Mrs. NORTON. Mr. Speaker, by direction of the Committee on Labor I call up the bill (H. R. 7274) to enable the Department of Labor to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices and to cooperate with the States in the promotion of such standards, and ask for its immediate consideration.

The Clerk read the title of the bill.

Mrs. NORTON. Mr. Speaker, I ask unanimous consent that the bill may be considered in the House as in Committee of the Whole.

The SPEAKER. The gentlewoman from New Jersey asks unanimous consent that the bill may be considered in the House as in Committee of the Whole. Is there objection?

Mr. MARTIN of Massachusetts. Mr. Speaker, reserving the right to object, before we give this permission I think we should know something about the bill. We are somewhat handicapped because we did not expect it to come up at this time.

Mrs. NORTON. Mr. Speaker, I may say to the gentleman from Massachusetts that the author of the bill, the gentleman from Connecticut [Mr. FITZGERALD], is here and will be pleased to explain the measure.

I may say further that the bill was reported out unanimously by the Committee on Labor before I became chairman of that committee. I have looked up the record and I have found that the vote of the committee was unanimous.

Mr. MARTIN of Massachusetts. I think the rest of the House should know something about the bill, and under my reservation of objection, in order that we may know what the bill is about, I yield to the gentleman from Connecticut.

Mr. FITZGERALD. Mr. Speaker, this bill sets up in the Department of Labor an apprentice training system for the youth of this country. We have debated here today

for hours about taking 300,000 boys and putting them into the forest of America. This bill will provide a cloak of protection to put around boys and girls and encourage them to go back into the skilled trades, and in some localities today we have a crying need for trained and skilled workers.

Mr. MARTIN of Massachusetts. Just what does the bill do?

Mr. FITZGERALD. The bill sets up standards by Federal cooperation with the States and through the formation of voluntary committees in the States, throwing a cloak of protection around the boys and girls and setting up standards and protecting them and guaranteeing that when their time of service in a trade has expired, they will come out full-fledged mechanics. It also incorporates vocational education in the plants.

Mr. HOFFMANN. [sic] Mr. Speaker, will the gentleman yield for a question when he concludes his statement?

Mr. FITZGERALD. Yes. the bill was heard by a subcommittee of the Committee on Labor and representatives of labor and capital appeared. I may say this is, perhaps, the only bill before the House today that both labor and capital are in favor of. The National Manufacturers Association wrote the committee and went on record in favor of the bill and Mr. John Frey represented the American Federation of Labor before the committee, testifying in favor of the bill.

If you really want to do something for the youth of the country, this is one of the best bills you can pass,

because it will encourage them to learn a skilled trade as a means of livelihood.

In the past 25 years over one million and a quarter mechanics have come here from the European countries, and I am going to tell the Members of the House now that if a bill of this nature is not passed and a system of this kind is not established, within 10 years you will lower your immigration bars in order to get mechanics from across the water. We have a need for mechanics in special lines today. Industry is crying for them and still we are passing laws here to put the youth of our country into the forests, instead of encouraging them to go back into the trades and become skilled mechanics.

Mr. HOFFMAN. Mr. Speaker, will the gentleman yield?

Mr. FITZGERALD. Yes.

Mr. HOFFMAN. In the New York Times of yesterday and in the same paper the day before there was a long article each day by a special writer who had been investigating conditions in Michigan, and in the article the statement was made that the W.P.A. and the C.I.O. were interested and that the C.I.O. had contributed some $6,000 in Michigan for the purpose of educating the youth there along certain lines. If the Department of Labor establishes this school, what connection, if any, will the C.I.O. workers have with the undertaking?

Mr. FITZGERALD. This bill does not propose to establish schools, but it proposes to protect the boys and girls in industry.

Mr. HOFFMAN. It proposes to educate them.

Mr. FITZGERALD. While they are getting practical knowledge, so that a boy, after serving an apprenticeship of 4 years, will not be exploited, but when he has served his apprenticeship he will be a first-class mechanic.

Mr. HOFFMAN. The question I want to ask the gentleman is this: What part has the C.I.O. in the training of these young men and women?

Mr. FITZGERALD. It has nothing to do with it, to my knowledge.

Mr. HOFFMAN. The W.P.A. has something to do with it, according to this article.

Mr. FITZGERALD. I do not know about that, but I do know that the bill is endorsed by both labor and capital.

Mr. HOFFMAN. Will not the C.I.O. furnish the teachers if the training is under the present Secretary of Labor?

Mr. FITZGERALD. The training is going to be done by the employers in the various industries.

Mr. HOFFMAN. But under the supervision of the Department of Labor?

Mr. FITZGERALD. The standards will be set up by the Department of Labor in cooperation with the States.

Mr. HOFFMAN. With the cooperation of Mme. Perkins?

Mr. FITZGERALD. The Department of Labor.

Mr. MARTIN of Massachusetts. Will the gentleman tell us whether the committee went into the cost of the administration of this bill?

Mr. FITZGERALD. Approximately $56,000 has been the amount provided previously. This activity has been functioning under the National Youth Administration.

If the gentleman will recall, 2 months ago, when the Committee on Appropriations had that part of the bill under consideration, they would not pass it, because that committee claimed it was not removed legally from the National Youth Administration into the Department of Labor. Both the minority and the majority parties on the committee are in favor of making that small appropriation of $56,900.

Mr. MARTIN of Massachusetts. And this is transferring it to the Department of Labor?

Mr. FITZGERALD. Yes.

Mr. MARTIN of Massachusetts. And then setting up a standard for the apprenticeship, for the different States?

Mr. FITZGERALD. Yes.

Mr. MARTIN of Massachusetts. It is all voluntary?

Mr. FITZGERALD. Yes.

Mr. MARTIN of Massachusetts. It is not compulsory?

Mr. FITZGERALD. No. In fact, 45 States have set up State committees already, and 112 voluntary committees are working, and these States already have passed these plans during the last year. There was no opposition before the committee.

Mr. DITTER. Mr. Speaker, I reserve the right to object. Will the gentleman from Connecticut please tell us what the power of the National Advisory Committee will be?

Under section 2 the Secretary of Labor is authorized to appoint a National Advisory Committee to serve without compensation. Will the gentleman tell us what the duties and powers of that committee will be?

Mr. FITZGERALD. They will set up a voluntary plan. It is national because some association wrote and asked that the name be changed to the National Association or the National Committee, to make it function with the States.

Mr. DITTER. Then to that extent the Secretary of Labor will be able to carry out and formulate a policy with respect to the several States.

Mr. FITZGERALD. Not unless the States agree to it.

Mr. DITTER. But the Secretary of Labor is authorized to appoint the members of the Committee. There is no reservation, no limitation with respect to the authority of the Secretary of Labor.

Mr. FITZGERALD. The States adopt their own plan.

Mr. DITTER. I am speaking now of the National Advisory Committee. The gentleman said the National Advisory Committee's duties and powers would be to formulate policies. I say to that extent the influence of the Secretary of Labor will be expressed through the appointees of this committee.

Mr. FITZGERALD. The committee will be appointed through the State agencies.

Mr. DITTER. I am afraid that the gentleman and I are in disagreement. Under section 2 the Secretary of Labor has authority to appoint the committee. It does not say

anything except to appoint this national committee. It delegates that authority directly to the Secretary of Labor.

Mr. FITZGERALD. That is, the national committee sets up with the State organization a voluntary plan. Everything in this is voluntary.

Mr. DITTER. And to that extent, then, the Secretary of Labor's influence will be felt in the administration of the proposed act.

Mr. FITZGERALD. I would not say so.

Mr. DITTER. How is it to be obviated?

Mr. FITZGERALD. Because it will be voluntary on the part of a State whether it accepts the act or not.

Mr. DITTER. What is the power of the committee?

Mr. FITZGERALD. Just making recommendations; that is all.

Mr. MARTIN of Massachusetts. Mr. Speaker, I am satisfied with the explanation of the gentleman from Connecticut and I withdraw my reservation of objection.

The SPEAKER. Is there objection to the request of the gentlewoman from New Jersey to consider the bill in the House as in Committee of the Whole?

Mr. HOFFMAN. Mr. Speaker, I reserve the right to object in order to ask the gentleman a question.

The SPEAKER. The gentleman from Michigan reserves the right to object.

Mr. HOFFMAN. Here is the article to which I referred, and it says about $7,000 is set ascide [sic] by the

union each month for this educational program from its income of $350,000 a month, and it ties in with the W. P. A. If this committee is established by the Department of Labor to teach these young men and women and qualify them to follow a trade, how does that hook up with this?

Mr. FITZGERALD. I do not see any connection at all with it, because all this bill does is this: After a boy is in a plant, working, he is indentured to learn a trade in the plant, working for the company. After he is indentured, these standards will be set up for his protection. He will get his practical experience right there. His vocational education he will get through the trade school.

Mr. HOFFMAN. But these schools are to be set up in these plants, and the C. I. O. is furnishing $7,000 a month to assist in that. Does not that tie up directly with this?

Mr. FITZGERALD. No.

The SPEAKER. Is there objection to the request of the gentlewoman from New Jersey?

There was no objection.

The SPEAKER. The Clerk will report the bill.

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